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No. 2643.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a  
corporation,

*Plaintiff in Error,*

VS.

CALIFORNIA ADJUSTMENT COM-  
PANY, a corporation,

*Defendant in Error.*

## BRIEF OF PLAINTIFF IN ERROR

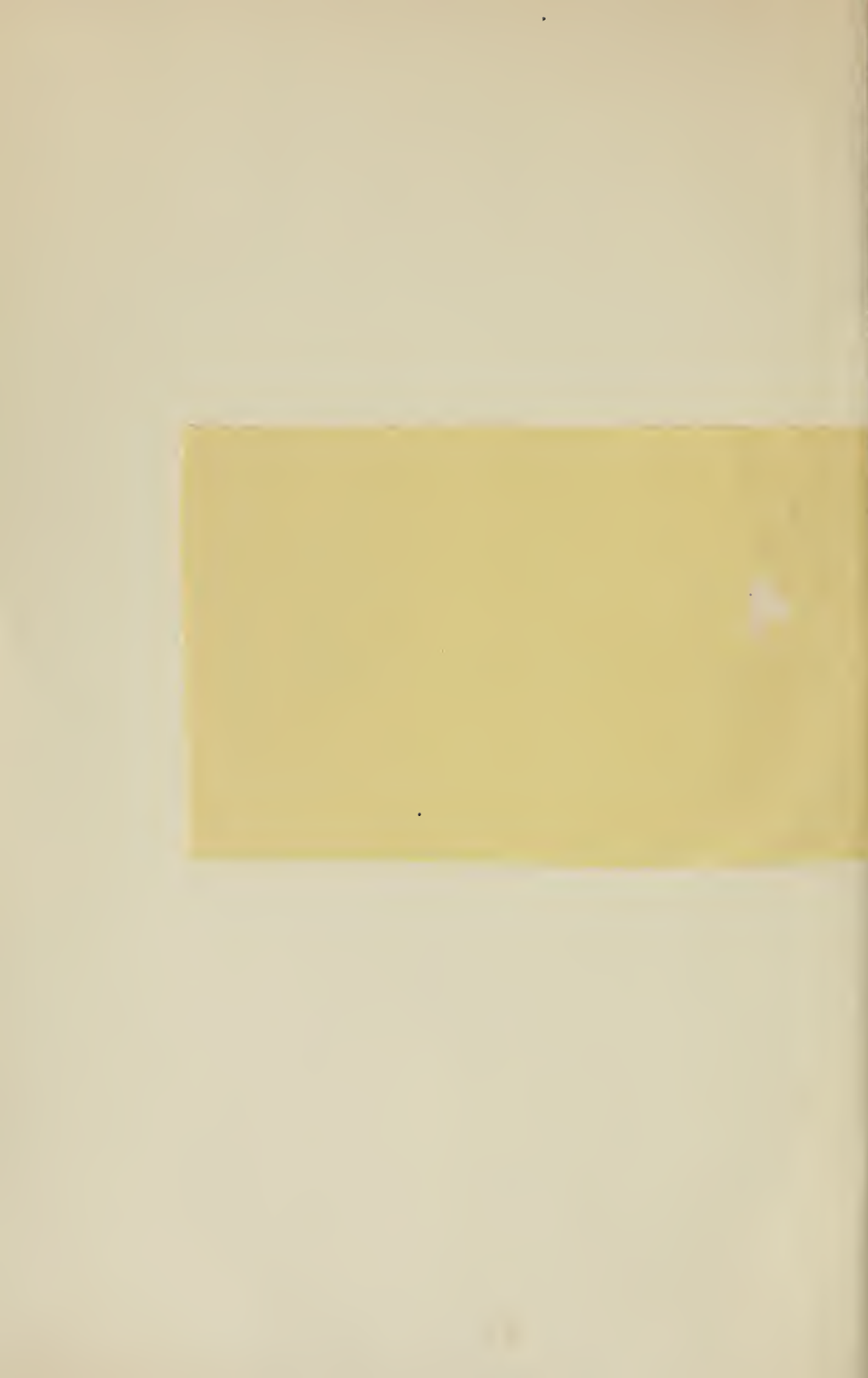
In Error to the United States District Court for the Northern  
District of California, Second Division.

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J. D. ADAMS, JR.,  
Clerk.

HENLEY C. BOOTH,  
FRANK B. AUSTIN,  
GEORGE D. SQUIRES,

*Attorneys for Plaintiff in Error.*

WM. F. HERRIN,  
*Of Counsel.*



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## STATEMENT OF THE CASE

Southern Pacific Company, as plaintiff in error, brings a writ of error to reverse a judgment of the District Court of the United States for the Northern District of California, rendered against it, and in favor of the California Adjustment Company, defendant in error, for \$3,928.01.

The complaint is on the law side of the Court and consists of one hundred and twenty counts, each of

the counts being on a claim assigned to the defendant in error, all of them being the same in substance and form, and each of them alleging that the plaintiff in error operates a line of railroad between San Francisco and Los Angeles, which passes through various intermediate stations; that plaintiff's assignors sent various shipments over plaintiff's lines from San Francisco or Los Angeles to those intermediate points, and that they were charged a higher rate than the charge then made by defendant for transportation in the same direction on the same amount and class of property from the point of shipment to the City of Los Angeles or the City of San Francisco.

In each count the defendant sought to recover the difference between a greater charge for a short haul and a lesser charge for a long haul in the same direction, upon the theory that the difference between the greater charge for the short haul and the lesser charge for the long haul was an excessive charge, forbidden by the provisions of the Constitution of the State of California.

It should be said here that while this case is not in any sense a moot case, the amount dependent on the final determination of this case is greatly in excess of the amount represented by the judgment of the Court below. There are a number of cases pending in the California State Courts involving large claims against both the plaintiff in error herein and another railroad company. As in this case Federal questions are directly raised in addition

to the general questions, trial of the cases in the State Courts has been deferred in anticipation of securing in the present case an authoritative decision upon some or all of the questions involved. The Supreme Court of California has not passed upon the question of the right of the defendant in error, or those similarly situated, to recover on the facts presented by the present record, or on the facts involved in the cases pending in the State Courts.

Therefore, in view of the magnitude of the claims which are practically dependent upon the result of this case, and also in view of the fact that it may fairly be said that the questions now presented to this Court, so far as they relate to the California Constitution, are novel and uncontrolled by any decision of the Supreme Court of California, we must beg the indulgence of the Court if this statement and the following brief go somewhat into detail.

The one hundred and twenty counts embraced in the complaint fall naturally into two classes: *First*, counts upon so-called excessive charges collected prior to October 10, 1911, when Article XII of the California Constitution was amended, said article relating to the regulation of common carriers, and the powers and duties of the California Railroad Commission; *second*, counts upon so-called excessive charges collected after the amendments of October 10, 1911, to Article XII of the California Constitution. It is possible that this second class of counts may be subdivided into different periods, but that

will be a matter for subsequent treatment in this brief.

So that the Court may further fully understand the two subdivisions into which the one hundred and twenty counts naturally fall, we would state that, as to the first class, namely, those relating to shipments by railroad which moved and were delivered prior to October 10, 1911, there must be considered the following provisions of the California Constitution :

## CALIFORNIA CONSTITUTIONAL PROVISIONS, 1879-OCTOBER 10, 1911.

### Article XII, Section 21:

“No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same class of freight or passengers within this State, or coming from or going to any other State. Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing. Excursion and commutation tickets may be issued at special rates.”

### Section 22:

“\* \* \* Said Commissioners shall have the power, and it shall be their duty, to establish

rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make; to examine the books, records and papers of all railroad and other transportation companies, and for this purpose they shall have power to issue subpoenas and all other necessary process; to hear and determine complaints against railroad and other transportation companies; to send for persons and papers; to administer oaths, take testimony, and punish for contempt of their orders and processes, in the same manner and to the same extent as courts of record, and enforce their decisions and correct abuses through the medium of the courts. Said Commissioners shall prescribe a uniform system of accounts to be kept by all such corporations and companies. Any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such Commissioners, or shall charge rates in excess thereof, or shall fail to keep their accounts in accordance with the system prescribed by the Commission, shall be fined not exceeding \$20,000 for each offense; and every officer, agent or employee of any such corporation or company, who shall demand or receive rates in excess thereof, or who shall in any manner violate the provisions of this section, shall be fined not exceeding \$5,000, or be imprisoned in the county jail not exceeding one

year. In all controversies, civil or criminal, the rates of fares and freights established by said Commission shall be deemed conclusively just and reasonable, and in any action against such corporation or company for damages sustained by charging excessive rates, the plaintiff, in addition to the actual damage, may, in the discretion of the judge or jury, recover exemplary damages. \* \* \*"

Section 24:

"The Legislature shall pass all laws necessary for the enforcement of the provisions of this article."

As to the second class of claims involved herein, namely, those shipments which moved after October 10, 1911, there must be considered the following provisions of the California Constitution, as amended October 10, 1911:

Article XII, Section 21:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this State. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the

shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution, such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul. The Railroad Commission shall have power to authorize the issuance of excursion and commutation tickets at special rates. Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being excessive or discriminatory, provided no discrimination will result from such reparation."

#### Section 22:

"\* \* \* Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for

such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates established by said Commission, than the rates, fares and charges which are specified in such tariff. \* \* \*

*“No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.*

*“The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the ‘Railroad Commission Act’ of this State approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three Commissioners referred to in said Act shall be held and construed to be the five Commissioners provided for herein.”*

As to the first class of claims—on shipments that moved prior to October 10, 1911—it was claimed by the defendant in error, and held by the District Court, that although the rates actually charged and collected by the plaintiff in error as a railroad carrier were rates which had been fixed by the California Railroad Commission under the provisions of the State Constitution, nevertheless, to the extent that such rates violated what was claimed to be a hard-and-fast long and short haul rule contained in Article XII, Section 21, as it existed up to October 10, 1911, the fact that such rates were Commission-made rates was no defense to an action for collection of the difference between them and the lesser charge for the greater distance.

As to the second class of claims it was claimed by the defendant in error and held by the District Court, that immediately on the taking effect of the constitutional amendment of October 10, 1911, all rates violative of the long and short haul clause contained in Section 21 of Article XII as then amended, no matter what might have been their previous status, immediately became illegal to the extent that the greater charge for the shorter distance exceeded the lesser charge for the greater distance, and that the carrier could not be relieved from this illegality unless it first filed a petition for such relief, and unless upon such petition an investigation was had by the California Commission and the extent prescribed to which the carrier might be relieved from the prohibition against charging less for the longer than for the shorter haul, and that, pending the

determination of such application, the rates existing on October 10, 1911, which were violative of the amended section 21, furnished ground of action for the collection of excessive rates in favor of anyone who paid such violative rates.

These contentions of the plaintiff below we hope to answer in the brief. The defendant below, plaintiff in error here, answered the complaint by denying the material allegations of each count (Answer, Record pp. 333-337), and also by pleading thirteen separate and further defenses. These defenses, which will be found in order beginning at page 337 of Volume II of the Record, were substantially as follows:

1 That, owing to the existence of water competition between San Francisco and Los Angeles, the rates between those two cities were forced down to lower than reasonable rates for the services performed, and that the rates between San Francisco or Los Angeles and the intermediate points were reasonable; that if they were forced down to the rates between the terminals defendant would be required to observe intermediate rates which would not afford it compensation for the service performed, thus depriving it of property without due process of law.

2 Section 21 of Article XII of the Constitution of California, as it existed from 1879 to October 10, 1911, violates the Federal Constitution in that it attempts to fix rates without a hearing, thereby depriving carriers of due process of law, and that, if

the plaintiff in error is required to refund to defendant in error the difference between the rates charged and the lower rate for the long haul, the effect of this section would be to have arbitrarily established forced and compelled rates as intermediate rates, without due process of law.

3 If Section 21 of Article XII of the California Constitution required delivery of goods mentioned in the complaint, at the intermediate points at charges exceeding the charges imposed for transporting the same property in the same direction to Los Angeles or San Francisco, it is in violation of the Federal Constitution, for the reason that, in denying to defendant the right to meet water competition which forces its rates between San Francisco and Los Angeles below a reasonable basis, it operates to deprive plaintiff in error of the equal protection of the law.

4 Upon all of the shipments mentioned in the complaint which moved prior to October 10, 1911, the rates assessed were established by the Railroad Commission, pursuant to Section 22 of Article XII of the California Constitution as it existed from 1879 to October 10, 1911, and were therefore conclusively just and reasonable.

5 The through rates between Los Angeles and San Francisco on the same kind and quality of property as those alleged to have been transported to intermediate stations were forced down and compelled by actual water competition between San Francisco and Los Angeles, and therefore property

transported to the intermediate points set forth in the complaint was not property of the same class as property of the same physical character and commercially called by the same name, on which the lower through rates applied between the two terminal points.

6 That neither defendant in error, nor any of its assignors, has ever applied to the Railroad Commission of California for an order of reparation respecting any of the shipments described in the complaint, as provided by Section 71, sub-sections "a" and "b", of the Public Utilities Act of California, approved December 23, 1911, and effective March 23, 1912 (Stat. 1911, c. 14), and for that reason each of the causes of action is barred by the provisions of the Public Utilities Act.

7 The Railroad Commission had authorized plaintiff in error, after investigation, to charge more for the shorter distance to the intermediate point than for the longer haul between San Francisco and Los Angeles, pursuant to the provisions of Section 21 of Article XII of the California Constitution as amended October 10, 1911.

8 The rates assessed and collected upon all shipments mentioned in the complaint, which moved or were delivered subsequent to October 10, 1911, had been established by the Railroad Commission prior to that date, and had not at the time of their collection been changed in any manner.

9 All of the shipments which moved prior to October 10, 1911, were subject to Section 40 of the

Act approved March 19, 1909 (Stat. 1909, c. 312), commonly known as the "Wright Act", providing that in all actions between private parties and transportation companies subject to the Act, with respect to any rate, the published rate shall be deemed to be just and reasonable, and shall not be open to controversy except under such proceedings before the Commission and in the Courts as are provided for in that Act; and it is alleged that the Commission had never acted on or with respect to the rates assessed upon these shipments.

10 That the shippers paid the freight charges upon each of said shipments without protest, believing it to be the lawful rate; and in each case this was the amount specified by the tariffs which had been established by the Railroad Commission as to shipments moving both prior and subsequent to October 10, 1911, and the amount so paid was in each case no greater than a reasonable compensation for the service performed.

11 Each of the rates charged and collected was, when and as charged and collected, a just and reasonable rate for the service performed.

12 The railroad over which the shipments referred to in the complaint were transported forms a part of a system operated by plaintiff in error, and which is used for the carriage of freight and passengers in intrastate and interstate commerce. The defendant in error relies for a recovery upon Section 21 of Article XII of the California Constitution, and particularly on the long and short haul

provision thereof. The effect of the application of this clause to California intrastate shipments between San Francisco and Los Angeles would operate unduly to burden and interfere with interstate commerce, by subjecting it to a lower rate than intrastate freight of the same class and character moving between Los Angeles and San Francisco under the same circumstances. This would result because the through rail rates between San Francisco and Los Angeles are water-compelled and lower than reasonable for the service performed, while the interstate rates upon the same commodities to and from Arizona and New Mexico points upon plaintiff's railroad system in, to and out of San Francisco and Los Angeles, are not affected by water competition, but are reasonable rates for the service performed, and therefore to apply the long and short haul clause between San Francisco and Los Angeles would subject interstate commerce to a greater burden than intrastate commerce of the same character between San Francisco and Los Angeles, which burden would be undue and unjust.

13 Neither plaintiff nor any of its assignors has suffered any pecuniary loss or damage as the direct result of any of the matters pleaded in the complaint.

To each of these separate defenses the defendant in error interposed a demurrer (Record, Vol. II, pp. 340-352), on the ground that it did not state facts sufficient to constitute a defense or a counterclaim.

The Court, by District Judge Van Fleet (Record, pp. 362-366), sustained the demurrer as to all of

the defenses except the seventh, which was the defense that as to the shipments which moved after October 10, 1911, the Railroad Commission of California had, after investigation, authorized the railroad to charge more for the shorter distance than for the longer distance in the same direction.

This was the situation of the pleadings when the action came on for trial before the Court without a jury on May 6, 1915.

The plaintiff in the Court below submitted no evidence, relying upon the admissions made by the answer, and on the elimination of the special defenses by the sustaining of its demurrer.

The defendant thereupon submitted a written motion for a nonsuit (pp. 369-371) upon the following grounds:

1 It was not shown that the so-called excessive charges exceeded by any sum whatsoever the charge then made for the transportation in the same direction of the same amount and class of property from the point of shipment referred to in the complaint to the more distant point from the point of delivery.

2 It did not appear that defendant had never been authorized by the Railroad Commission to charge less for longer than for shorter distances for the transportation of property, nor did it appear that defendant had not been authorized by the Commission with respect to the shipments involved in the complaint to charge less for the longer than for the shorter haul.

3 It was not shown that the Railroad Commission had never prescribed that defendant might in any case, or in any of the cases referred to in the complaint, be relieved from the prohibition of the long and short haul clause of the California Constitution.

4 It affirmatively appears from plaintiff's evidence, taken in connection with the admissions of the pleadings, that plaintiff's assignors paid, voluntarily and without protest, the amounts alleged to have been collected by defendant.

5 That plaintiff has failed to show that it or any of its assignors suffered any damage as a direct result of any of the matters set forth in the complaint.

The Court denied the motion, and thereupon defendant opened its case.

Evidence was offered by the plaintiff in error, defendant below, which was rejected by the Court, and which will be commented on later. The Court then gave judgment for the plaintiff below, as prayed for, and subsequently made special findings of fact (Record, p. 357), which findings in substance were as follows:

1 Defendant was not authorized by the Railroad Commission in any of the instances specified in the complaint to charge more for the shorter than for the longer haul.

2 It is not true that in the case of all or any of the shipments delivered after October 10, 1911, the

Railroad Commission had prescribed by order or otherwise that defendant might be relieved from the prohibition of the California Constitution against charging less for the longer than for the shorter haul.

3 It is not true that the property transported by defendant as alleged in the complaint was not property of the same class as that on which lower than through rates from Los Angeles to San Francisco were then being charged by defendant, but, on the contrary, the Court found that such property was in each instance property of the same class as that on which the lower through rates were charged.

These findings of fact were based upon the ruling of the Court on demurrer, hereinabove referred to, and upon the exclusion by the Court of certain evidence offered by the plaintiff in error, which evidence was addressed to the following questions:

1st Evidence to show that the rates charged and collected by the plaintiff in error, and claimed by the defendant in error to have been excessive, were, prior to October 10, 1911, rates which had been fixed, established and promulgated by the California Railroad Commission under the provisions of Article XII of the California Constitution of 1879, as it existed up to October 10, 1911.

2nd Evidence to show that the rates of the plaintiff in error existing on October 10, 1911, were rates which theretofore had been duly established, fixed and promulgated by the California Railroad Commission, and that those rates, by virtue of the con-

stitutional provisions which we have cited and which we will discuss in the brief, continued in effect after October 10, 1911, and until they were changed by the Commission.

3rd Evidence to show that after October 10, 1911, the Railroad Commission issued a series of orders requiring carriers to come in and file petitions for whatever relief they desired from the provisions of the long and short haul clause amendment of October 10, 1911, those orders granting, until determination by the Commission of the petitions, relief from the provisions of that section. These orders by the Commission were refused admission in evidence, on the ground that neither petition by the carrier nor investigation had preceded the making of such orders.

4th Evidence showing that as to all of the shipments involved in this action, which moved after October 10, 1911, the plaintiff in error had filed on December 30, 1911, petitions with the California Commission, pursuant to the orders next hereinabove referred to.

5th Evidence to show that the rates actually charged and collected were reasonable in and of themselves, in view of the service performed, and to show that the lesser rate for the greater distance was a rate compelled by water competition between the ports of San Francisco and Los Angeles. This evidence was excluded on the theory that it was immaterial and that the Court had disposed of those defenses by its ruling on demurrer.

We will now, under the appropriate heading, state to the Court a specification of the errors relied upon, which will include the substance of the evidence rejected.

### SPECIFICATION OF ERRORS.

1 The Court erred in sustaining the demurrer of the defendant in error to the first separate defense of plaintiff in error, which first separate defense is set forth in full on page 337 of the printed record.

2 The Court erred in sustaining the demurrer of defendant in error to the second separate defense of plaintiff in error, which second separate defense is set forth in full on page 339 of the printed record.

3 The Court erred in sustaining the demurrer of defendant in error to the third separate defense of plaintiff in error, which third separate defense is set forth in full on page 339 of the record.

4 The Court erred in sustaining the demurrer of defendant in error to the fourth separate defense of plaintiff in error, which fourth separate defense is set forth in full on page 340 of the record.

5 The Court erred in sustaining the demurrer of defendant in error to the fifth separate defense of plaintiff in error, which fifth separate defense is set forth in full on page 340 of the record.

6 The Court erred in sustaining the demurrer of defendant in error to the sixth separate defense of plaintiff in error, which sixth separate defense is set forth in full on page 341 of the record.

7 The Court erred in sustaining the demurrer of defendant in error to the eighth separate defense of plaintiff in error, which eighth separate defense is set forth in full on page 343 of the record.

8 The Court erred in sustaining the demurrer of defendant in error to the ninth separate defense of plaintiff in error, which ninth separate defense is set forth in full on page 343 of the record.

9 The Court erred in sustaining the demurrer of defendant in error to the tenth separate defense of plaintiff in error, which tenth separate defense is set forth in full on page 344 of the record.

10 The Court erred in sustaining the demurrer of defendant in error to the eleventh separate defense of plaintiff in error, which eleventh separate defense is set forth in full on page 345 of the record.

11 The Court erred in sustaining the demurrer of defendant in error to the twelfth separate defense of plaintiff in error, which twelfth separate defense is set forth in full on page 345 of the record.

12 The Court erred in sustaining the demurrer of defendant in error to the thirteenth separate defense of plaintiff in error, which thirteenth separate defense is set forth in full on page 346 of the record.

13 The Court erred in denying the motion for nonsuit.

14 The Court erred in sustaining the objection of the defendant in error to the introduction in evidence by the plaintiff in error of a certified copy of

an order and decision of the Railroad Commission of the State of California, dated May 20, 1910, and made and entered in Case No. 110, entitled "Associated Jobbers of Los Angeles, Complainant, vs. Southern Pacific Company et al., Defendants," which order is set forth on pages 382 et seq. of the printed record, and was an order of the California Railroad Commission fixing the rates shown in column 10 of defendant's Exhibit A (Record, pp. 377-8) as rates fixed by the California Railroad Commission's Case No. 110, and so testified to by witness Reinhart (Record, p. 379), the rates so fixed by said order covering in part the rates collected alleged to have been excessive.

15 The Court erred in sustaining the objection of the defendant in error to the offer of the plaintiff in error of the notice by the Railroad Commission of the State of California in its Case No. 214, entitled "In the Matter of the Provisions of Section 21 of Article XII of the Constitution of California, Relating to Long and Short Hauls, and other Rates Exceeding the Aggregate of Intermediate Rates," which notice was dated October 26, 1911, and is set forth at pages 399 et seq. of the printed record. Said notice so issued by the Railroad Commission of the State of California, ordered railroad and other transportation companies to present to the Commission, on or before January 2, 1912, for examination and investigation by the Commission, a new schedule or schedules removing deviations from the long and short haul clause from the provisions of said section of the Constitution, or, in case it was

desired to justify the same, an application to be relieved from the provisions of said section—forms of said application being contained in said notice.

16 The Court erred in sustaining the objection of the defendant in error to the order of said Railroad Commission offered by plaintiff in error, dated November 20, 1911, which said order is set forth beginning at page 404 of the printed record, and which said order grants permission to railroads and other transportation companies until January 2, 1912, to file for establishment with the Commission, in the manner prescribed by law, “and in accordance with the Commission’s regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate basis or adjudgments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911.”

17 The Court erred in sustaining the objection of the defendant in error to the offer of plaintiff in error of certified copies of Southern Pacific Company’s petitions Nos. 3, 9, 10, 30 and 40, addressed to the Railroad Commission of the State of California, praying for relief from the provisions of Section 21 of Article XII of the California Constitution, as amended October 10, 1911, with respect to the rates specified in those petitions, said rates including all of the rates collected by the plaintiff in error and made the subject of suit herein in the respective counts of the defendant in error in the

complaint filed in the Court below. Said petitions were filed on December 30, 1911, pursuant to the order next hereinabove referred to made by the said Railroad Commission on November 20, 1911, and the said notice by the Railroad Commission, dated October 26, 1911. Each of said petitions prays for authority for said Southern Pacific Company to continue, for itself and its participating carriers, rates for the transportation of property as described in said petition higher for like kinds of property for the shorter than for the longer distance over the same line or road, in the same direction, as described in said respective petitions. Said petitions Nos. 3, 9, 10, 30 and 40 are printed seriatim, beginning at page 407, and extending to page 422 of the printed record.

18 The Court erred in sustaining the objection of the defendant in error to the offer by the plaintiff in error of a copy of the minutes of the California Railroad Commission of January 2, 1912, said offer, together with the stipulations relating thereto, being printed, beginning at page 423 of the record. Said minutes showed that Case No. 214 before said California Railroad Commission, relative to the provisions of Section 21 of Article XII of the California Constitution, relating to long and short hauls, etc., came on for hearing before the Commission on January 2, 1912, and that after a discussion of the case the meeting was adjourned. The evidence showed that the case is pending.

19 The Court erred in sustaining the objection of the defendant in error to the introduction in evi-

dence by plaintiff in error of an order of the Railroad Commission of the State of California, dated January 16, 1912, made and entered in said Case No. 214, a copy of which order is printed in the record, beginning at page 425. Said order provided, in substance, that until February 15, 1912, the railroad and other transportation companies might file for establishment with the Commission, in the manner prescribed by law, and in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing under the present rate bases or adjustments higher fares or rates at intermediate points, provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911.

20 The Court erred in sustaining the objection of the defendant in error to the offer by the plaintiff in error of a certified copy of the decision of said California Railroad Commission, dated March 28, 1912, made and entered in Case No. 116 before said Commission, which said order is printed in the record, beginning at page 428, and which said order fixes as of April 3, 1915, certain rates which were collected and are sued on herein.

21 The Court erred in sustaining the objection of the defendant in error to a question propounded by the plaintiff in error to the witness F. W. Gompf, which question was as to whether the letter mentioned in the next succeeding assignment of error herein was a correct copy of the letter sent to the

California Railroad Commission by the Southern Pacific Company through the agency of the witness, transmitting the tariffs therein specified, and whether those tariffs were filed with the Commission.

22 The Court erred in sustaining the objection of the defendant in error to the letter offered by the plaintiff in error, addressed to the Board of Railroad Commissioners of the State of California at San Francisco by the Southern Pacific Company, dated May 7, 1909, a copy of which letter, with the list of tariffs therein referred to, is printed in the record, beginning at page 434. Said letter transmitted certain tariffs to said Railroad Commission, which said tariffs are enumerated in the list attached to said letter, and said letter bore the endorsement that it was received on May 8, 1909, by the Secretary of the California Railroad Commission.

23 The Court erred in sustaining the objection of the defendant in error to the offer by the plaintiff in error to show by the witness Gomph that all of the tariffs of said Southern Pacific Company relative to the movement of freight in California were actually filed with and remained on file with the Railroad Commission of California until the Commission entered an order on June 11, 1909, approving the tariffs on file.

24 The Court erred in sustaining the objection of the defendant in error to the offer by plaintiff in error of the order made by the Railroad Commission of the State of California dated June 11, 1909, approving the rates, fares and charges of the car-

riers named in said order, which said order is printed in the record, beginning at page 445, and which said order recites that certain carriers, including the Southern Pacific Company, have filed with the Commission a printed copy of schedules showing their rates, fares and charges for transportation of freight and passengers within California, and that "the aforesaid schedules be and they are hereby received and filed by this Commission as the rates, fares and charges \* \* \* \* which have been made and filed by said carriers respectively \* \* \* and that the said rates, fares and charges shall be published by said carriers respectively, as required by the said Act, and shall be the lawful rates, fares and charges of said carriers respectively \* \* \*"

25 The Court erred in sustaining the objection of the defendant in error to an offer by plaintiff in error to show (Record p. 448) by witness J. K. Butler, Assistant General Freight Agent of plaintiff in error, that in his opinion as a freight traffic man the rates charged plaintiff's assignors were reasonable in and of themselves for the services performed, and furthermore that the through rate which is contended for here was a rate less than a reasonable rate in and of itself for the service to be performed under the through rate, and was compelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles.

26 The Court erred in holding and deciding in its special findings of fact that it was not true, as alleged in paragraph 4 of defendant's answer, that

in each or any instance stated in the complaint where, for the transportation of property, defendant charged more for the shorter than for the longer distance in the same direction of the same kind and class of property, defendant had been so authorized to do by the Railroad Commission of the State of California.

27 The Court erred in holding and deciding in its special findings of fact that it is not true, as alleged in paragraph V of defendant's answer, that in the case of all or any of the shipments described in the complaint as having moved or having been delivered after October 10, 1911, the Railroad Commission of California had prescribed, by order or otherwise, that the defendant might be relieved from the prohibition of the Constitution of the State of California against charging less for the longer than for the shorter haul, nor that it was true that, as alleged in defendant's seventh further and separate defense in its answer, that as to each and all of such shipments moving after October 10, 1911, said Railroad Commission had authorized defendant, after investigation or at all, to charge more for the shorter distance to the point between San Francisco and Los Angeles to which such shipment was transported than for the longer distance in the same direction.

28 The Court erred in holding and deciding in its special findings of fact that it is not true, as alleged in paragraph III of defendant's answer, that the property transported by defendant, as

alleged in each of the separately stated causes of action, was not property of the same class as the property on which lower through rates from Los Angeles to San Francisco were then being charged by defendant.

29 The Court erred in rendering judgment against defendant instead of in favor of this plaintiff in error and against said defendant in error.

Each of said rulings of said Court hereinabove assigned and specified as errors relied upon, were specifically excepted to by plaintiff in error.

### BRIEF OF THE ARGUMENT.

The points of law involved, all of which were decided adversely to plaintiff in error by the Court below, and which said points are relied upon for a reversal of the judgment herein, are as follows:

#### I.

*Section 21 of Article XII of the California Constitution as it existed from 1879 to October 10, 1911, and which contains the so-called long and short haul clause upon which the first general class of cases sued on herein is founded, is invalid because in terms it attempts to regulate interstate commerce, and the attempt so to regulate interstate commerce is so intermingled with and inseparable from the other provisions that it cannot be presumed that the section would have been adopted if the invalidity of the portion thereof attempting to regulate interstate commerce had been known, and that therefore, under familiar rules of construction, the whole section falls.*

The first general class of cases embraced in the complaint are those wherein defendant in error sought to recover upon the theory that, although the Railroad Commission of the State of California, pursuant to Section 22 of Article XII of the California Constitution as it existed until October 10, 1911, had established the rates of charges actually collected by the plaintiff in error on the shipments involved, nevertheless if such rates of charges exceeded the rates of charges established by the Commission for the same class of property in the same direction to a more distant station, port or landing, the higher intermediate rate so fixed by the Commission was an illegal rate, and the railroad was obligated not to collect more than the lesser charge to the more distant point.

That the Commission prior to October 10, 1911, had established the rates to the intermediate point—that is, the rates actually collected—was specifically pleaded as to the charges collected prior to October 10, 1911, by the fourth separate defense (Record p. 340), and as to the charges collected after October 10, 1911, by the eighth further and separate defense (Record, p. 343), to each of which a general demurrer, as hereinbefore shown, was sustained by the Court. That the Commission actually did establish such rates as the rates which should be charged to the intermediate point, the plaintiff in error endeavored to show by the offer of the order of the California Railroad Commission in its case No. 110, which was excluded by the Court (Record p. 381, Exception No. 3), and by endeavor-

ing to show by the witness Gomph (Record p. 433) that the Commission had established such rates prior to October 10, 1911, and that the fares so established were in conflict with the long and short haul clause of the California Constitution as it stood up to October 10, 1911 (Record p. 433).

The evidence offered and excluded was, *first*, a letter from the Freight Traffic Manager of the Southern Pacific Company (Record p. 434), transmitting the tariffs therein specified to the Railroad Commission, and *second*, an offer to show by witness Gomph that all of the tariffs of the Southern Pacific Company relative to the movement of freight in California were actually filed and remained with the California Railroad Commission until the Commission entered an order on June 11, 1909, establishing the tariffs on file with it as the lawful rates and fares (Gomph's testimony, Record, p. 444), and *third*, the defendant's offer of a certified copy of the order of the Railroad Commission, dated June 11, 1909, approving the rates, fares and charges of the carriers named in the order, and establishing them as lawful rates, fares and charges (Record p. 444).

The offers so made were further tied to the respective counts of the complaint by the admission in evidence of defendant's Exhibit A, beginning at page 376 of the printed record, which shows in column 10 the tariff numbers of the tariffs upon which the charges were collected, and in column 14 the tariff numbers of the tariffs showing the rate effec-

tive if the through tariff should have been observed to the more distant point, as contended for by defendant in error.

It cannot be questioned, therefore, that the record is complete on the subject that the plaintiff in error endeavored to show that the rates actually charged and collected, and upon which defendant in error bases its demand, were rates established by the Railroad Commission of the State of California. It would follow that if Section 21 of Article XII is void for the reasons stated in the italicised heading to this subdivision of the brief, the trial Court not only should not have sustained the demurrer of the defendant in error to the separate defenses of the plaintiff in error Numbers Four and Eight, specifically pleading the establishment of tariffs by the Railroad Commission, but also that the Court below should not have excluded the evidence showing that the rates collected were rates actually established by the California Commission prior to October 10, 1911, and that the Commission had also, in the same manner, established lesser rates for the greater distance.

The invalidity of Section 21 of Article XII of the California Constitution of 1879 will be apparent, we believe, from a mere reading of the provisions of the section, in that the section expressly endeavors to regulate rates charged by California carriers, no matter whether such rates relate to interstate or intrastate movements. The section begins by prohibiting discrimination in charges for transportation be-

tween places or persons "within this State, or coming from or going to any other State," and then provides that property transported over a railroad "shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class in the same direction, to any more distant station, port or landing."

The section therefore is one prohibiting discrimination, and it seems perfectly clear that the framer of the section had in mind the protection of places and persons in California against discrimination by a railroad, no matter whether such discrimination consisted in the application of interstate rates or in the application of intrastate rates, or a combination of both.

It will be remembered that at the time of the adoption of this section the Central Pacific line had been constructed. It is apparent that it was the intention of the framer of the section to prohibit a lesser rate for a longer distance on the line of a railroad between Oakland and Reno, as well as to prohibit the same form of discrimination between Oakland and Sacramento. It requires no extended citation of authorities to the point that Congress, under the Commerce Clause, is supreme with respect to interstate and foreign commerce, and that whenever it does act with respect to interstate or foreign commerce it completely occupies the field to the exclusion of state legislation, leaving no twilight zone or border land within which the State may exercise

jurisdiction. This is clearly pointed out by the United States Supreme Court in the recent decision in *Erie Railroad Company vs. State of New York*, 233 U. S. 671.

The first Employers' Liability cases, 207 U. S. 463, illustrate the disposition of the Federal courts to preserve the division of power between the Federal and the State governments, and also to hold that when a congressional enactment under the Commerce Clause is so framed that it cannot be said that Congress would have enacted the legislation if its invalidity as to a portion of the field attempted to be covered had been known or apprehended, the whole legislative enactment will fail. The case is peculiarly applicable here, since a State constitutional provision, when it comes in conflict with a provision of the United States Constitution or with Federal legislation enacted thereunder, is of no more sanctity or validity than an Act of the State Legislature.

In the Employers' Liability cases, 207 U. S. 463, there was considered by the Court the constitutionality of an Act of Congress under the Commerce Clause, which was known as the Federal Employers' Liability Act of July 11, 1906. (32 Stat. 232). The Court held that this Act applied to all common carriers engaged in interstate commerce, and that it imposed a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees might have been engaged at the time of the injury, and therefore that of necessity it included

subjects wholly outside of the power of Congress to regulate commerce (207 U. S. 498); and the Court said that as the Act thus included many subjects wholly beyond the power of Congress to regulate commerce, but dependent for its sanction upon that power, therefore "It results that the Act is repugnant to the Constitution and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved."

It was argued that, so far as the face of the statute was concerned, it in terms applied only to carriers engaged in commerce between the States, and that therefore it should be interpreted as being exclusively applicable to the interstate business, and no other, of such carriers, and that the words "any employee" as found in the statute should be held to mean any employee when such employee was engaged only in interstate commerce. The Court said:

"But this would require us to write into the statute words of limitation and restriction not found in it \* \* \* To write into the Act the qualifying words therefore would be but adding to its provisions another to save it in one aspect and thereby to destroy it in another—that is, to destroy in order to save, and to save in order to destroy."

The Court then said:

"The principles of construction invoked are undoubted, but are inapplicable. Of course if it can lawfully be done, our duty is to construe the statute so as to render it constitutional. But

this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional, and others which are not, effect may be given to the legal provisions by separating them from the illegal. *But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated.* All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois Central Railroad vs. McKendree*, 203 U. S. 514, and authorities there cited."

The Court, after further discussion, concluded:

*"That the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation."*

In the case of *Baldwin vs. Franks*, 120 U. S. 678, it was said by the Court on page 685 that to give

effect to the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the constitutional part may be enforced and only that which is unconstitutional rejected,

“The parts (that which is constitutional and that which is unconstitutional) must be capable of separation so that each may be read by itself  
\* \* \* The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.”

In the Virginia Coupon cases (*Poindexter vs. Greenhow*, 114 U. S. 270) it was said by the Court, respecting certain acts of the Assembly relative to taxation, and as to which a portion concededly violated the Federal Constitution by impairing the obligation of a contract, that the vice which invalidated the Acts pervaded them throughout and in all of their provisions, and (page 304): “The scheme of the whole is indivisible. It cannot be separated into parts; it must stand or fall together. \* \* \*”

After referring to cases:

“These are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law in-

tended by the Legislature one they may never have been willing by itself to enact.”

The Court then refers to the Trade Mark Cases (100 U. S. 82), and cites with approval the language of the Court in that case at page 99, that:

“If in the case before us we should undertake to make by a judicial construction a law which Congress did not make itself, quite probably we should do what, if the matter were now before that body, it would be unwilling to do.”

Particularly applicable to the case at bar is the language of the Court in *United States vs. Reese*, 92 U. S. 214, where the Court, in construing a case arising in Kentucky under the Fifteenth Amendment, says, with regard to the provisions of a Federal penal statute intended to carry the provisions of that amendment into effect:

“We are therefore directly called upon to decide whether a penal statute enacted by Congress \* \* \* can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute first. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the sec-

tion, but by inserting those that are not now there. \* \* \* The question then to be determined is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. \* \* \* To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In the case at bar, therefore, to give effect to any contention that may be made that the old Section 21, Article XII, California Constitution, is to be construed as referring only to movements beginning and ending within the State, and as to a comparison of the rates charged for these movements with rates to more distant points within the State, this Court would necessarily have to read into the second sentence of Section 21 appropriate words of limitation, which, from the first sentence of the section, were not in the minds of those who drafted or adopted the section, *and which in any event would be an addition to and not an elimination from the language of the second sentence of Section 21.*

It may be claimed by defendant in error that Section 21 of Article XII of the California Constitution of 1879 is separable as respects the three sentences constituting the section, and that even though the first sentence be vulnerable to attack on the ground that it is a palpable effort to regulate interstate commerce, the second sentence is not subject to the same objection, and therefore that the second sen-

tence may be given the construction contended for here by the defendant in error and upheld by the learned District Judge, to the effect that it is a mandatory prohibitory clause of the Constitution, regulating the rates to be fixed by the State Commission under the succeeding Section 22. We think the section should be considered as an entirety, as an effort to forbid discrimination, but if it be susceptible of division into sentences, the vice remains in the second sentence.

A consideration of the second sentence of Section 21, in the light of the Federal decisions relative to interference with interstate commerce, will show that the idea of regulation of interstate commerce is so interwoven with what, under some views of the decisions, the State might do in regulating intrastate commerce under the long and short haul principle, that the illegal part is inseparably mingled with the part which merely, for the sake of the argument, may now be conceded to be legal—that is, the adoption of the long and short haul principle as applied to commerce beginning and ending entirely within the limits of the State of California, with a relieving power somewhere.

The second sentence reads:

“Persons and property transported over any railroad or by any other transportation company or individual shipper shall be delivered at *any station*, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class in the

same direction to *any more distant station*, port or landing.”

It will thus be seen that if the carrier had in effect a rate say of 50 cents per hundred pounds on a given commodity from Oakland to Sacramento, and at the same time had a rate, either voluntarily established or *compelled by Federal authority*, of 20 cents per hundred pounds for the same commodity over the same line or route from Oakland to Reno, the 50-cent charge would immediately and automatically, assuming the validity of the sentence just quoted, become invalid under the specific provisions of that sentence to the extent that it exceeded the 20-cent rate, because it would be a charge in the same direction and would be a charge to a more distant station. And this despite the fact that California has not and has never had the right to fix the rate from Oakland to Reno.

Illustrative of this principle and of the inseparability of such provisions, is the case of *Wabash, St. Louis & Pacific Railway Company vs. Illinois*, 118 U. S. 557; 30 Lawyers' Ed. 244. In that case the Illinois statute provided that if a railroad corporation charged for transportation “for any distance within the State” the same or a greater amount than at the same time was charged for the transportation in the same direction of the same class of property “over a greater distance on the same road,” such discriminatory rate should be taken as *prima facie* evidence of unjust discrimination, prohibited by the provisions of the Act. The statute provided a pen-

alty recoverable by the State, and also specifically gave the party aggrieved the right to recover three times the amount of damages sustained, etc.

The Supreme Court of Illinois held that while the statute was inoperative upon that part of the contract which had reference to the transportation outside of the State, it was binding and effectual as to so much of the transportation as was within the limits of the State (*People vs. Wabash, etc., Ry. Co.*, 104 Ill. 476), and the United States Supreme Court said (118 U. S. 564):

“If the Illinois statute could be considered to apply *exclusively* to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid.”

The Court then said that it might admit of question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of transportation than that which was purely intrastate, but that the Supreme Court of Illinois having given the aforesaid interpretation to the statute, the Supreme Court was bound to accept that construction. Therefore, treating the section as an entirety, it was held, after an exhaustive discussion by the Court and a citation of the cases in point, to be invalid as a palpable effort to interfere with, or at least to regulate, interstate commerce. And so the whole section fell to the ground.

The latest case on this question we have been able to find is that of *Sargent, Attorney-General, vs. Rutland Railroad Company*, 86 Vt. 328; 85 Atl. 654, decided by the Supreme Court of Vermont in 1913. In that case the Vermont statute provided that the railroad should not charge, collect or receive "any demurrage charge on freight received at any station in this State" until four days after notification of the consignee; and another statute also provided that no railroad company doing business in Vermont should charge any demurrage upon any car "placed or held for loading in this State," until four days after notification to the consignor. The Public Service Commission construed the law of these sections as pertaining only to commerce wholly within the State, and its order in the premises was limited accordingly. This construction the Attorney-General said was as it should be, for otherwise the law might be subject to constitutional objections, and a statute is not to be construed, so he said, so as to be unconstitutional, if a reasonable construction can be placed upon it which will give its provisions constitutional effect. The reply to this was that the statute in terms applied to interstate commerce as well as intrastate commerce, and that the two elements are inseparable, and that since the valid portion cannot be separated from the invalid the principle of construction contended for by the Attorney-General did not apply. The Court said:

"It is true, as argued, that the fact that a part of a statute is in violation of the Constitution, does not authorize courts to declare the whole

statute void, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that they are not severable, or it cannot be presumed the Legislature would have passed the valid part without the other. If the invalid portion can be eliminated, and that which remains be complete in itself and capable of being executed in accordance with the apparent intent of the Legislature, wholly independent of the eliminated portion, it must be sustained. *State vs. Scampini*, 77 Vt. 92, 59 Atl. 201; *State vs. Abraham*, 78 Vt. 53, 61 Atl. 766; *State vs. Paige*, 78 Vt. 286, 62 Atl. 1017, 6 Ann. Cas. 725; *Howard vs. Illinois Central R. Co.*, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141. But when, as here, the provisions of the statute are clothed in plain language, and unambiguous, there is no room for construction. The effect is not to be determined on the basis of striking out or disregarding some of the words in the statute, nor by inserting others not there. It is not within the judicial province to give the words used a broader or a narrower meaning than they were manifestly intended to have, in order to bring the scope of the statute within the constitutional power of the Legislature to enact. *United States vs. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States vs. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. 601; *Trade Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Baldwin vs. Franks*, 120

U. S. 678, 30 L. ed. 766, 7 Sup. Ct. 656; *James vs. Bowman*, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. 678.

In *United States vs. Ju Yoy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. 644, questions were before the court based upon the Chinese Exclusion Acts. After stating that the Act purports to make the decision of the department final, whatever the ground on which the right to enter this country is claimed, as well when it is citizenship as when it is domicile, and the belonging to a class excepted from the exclusion acts; that the relevant portion of the Act of August, 1894, was not void as a whole, and that the statute had been upheld and enforced, the court, through Mr. Justice Holmes, said: 'But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again.'

In *Howard vs. Illinois Central R. Co.*, 207 U. S. 463, 52 L. ed 297, 28 Sup. Ct. 141, the question of the validity of the Federal Employers' Liability Act was involved. By Section 1, 'Every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between

the several states, \* \* \* shall be liable to any of its employees, \* \* \* for all damages which may result from the negligence of any of its officers, agents or employees, \* \* \* ' The questions raised concerned the nature and extent of the power of Congress to regulate commerce, it being contended, among other things, that the repugnancy of the act of the Constitution clearly appeared, as the face of the act made it certain that the power asserted extended not only to the regulation of master and servant among themselves as to things which were wholly interstate commerce, but embraced those relations as to matters and things domestic in character, and not coming within the authority of Congress. The court, Mr. Justice White, now the Chief Justice, delivering the opinion, said that from the first section it was certain that the act extended to every individual or corporation engaged in interstate commerce as a common carrier; that its all-embracing words left no room for any other conclusion; that the statute was addressed to the individuals or corporations engaged in interstate commerce, but was not confined solely to regulating the interstate commerce business which might be done by such persons or corporations; that the liability of a common carrier was declared to be in favor of 'any of its employees'; that as the word 'any' was unqualified, it followed that the liability to the servant was coextensive with the business done by the employers embraced by the statute,

the court instancing a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. It was held that as the act included subjects wholly beyond the power to regulate commerce, and depended for its sanction upon that authority, it was unconstitutional and could not be enforced unless there was merit in the propositions advanced to show that the statute might be saved. None of the propositions to which allusion is made was sustained, but we are here interested more particularly in the one that the statute might be interpreted so as to confine its operation wholly to interstate commerce, or to means appropriate to the regulation of that subject. Thereon the court said the argument that because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and the words 'any employee' as found in the statute, should be held to mean any employee when engaged only in interstate commerce, required the court to read into the statute words of limitation and restriction not found in it. To quote from the opinion, 'The principles of construction invoked are undoubted, but are inapplicable. Of course if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish

that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional, and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy.' It was further held that since the act, by its terms, related to every common carrier engaged in interstate commerce, and to any of the employees of every such common carrier, the court was unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. *Although the questions involved in this and in the preceding case noticed were based upon Federal statutes in terms overreaching congressional power, and not upon state enactments extending beyond state control, as in the case at bar, the governing principles of construction are the same.* Other cases illustrative of this point are, Louisville & Nashville R. Co. vs.

Centran Stock Yards Co., 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. 246; and Illinois Central R. Co. vs. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. 153."

We respectfully but earnestly submit, therefore, that either taking Section 21 of Article XII of the Constitution of 1879 in its entirety, or taking the second sentence thereof, the section itself, or either sentence thereof, plainly constitutes an effort on the part of the State of California at least to prescribe that no railroad within the State shall charge more for a shipment originating within the State and destined to a point within the State, than it does for a similar shipment in the same direction destined to a point without the State. We say that it at least has that effect, though in terms it goes farther. It has, we think, the unquestionable effect of attempting to provide that the long and short haul principle shall be applied to all shipments originating or terminating within the State; that is to say, that an interstate railroad operating in California, with its western terminus therein, would infringe the provisions of the section by charging more for a shipment from, say Oakland, to Reno than it charged for a similar shipment from Oakland to Ogden, or by charging more for a shipment from Sacramento to Oakland than for a similar shipment from Reno to Oakland. The language employed is apt, comprehensive and unmistakable. It is familiar learning that the Commerce Clause was designed to prevent States from damming the flow of commerce across their borders; that to the Federal government was by the

Commerce Clause secured the sole authority to regulate freedom and uniformity of commerce among the States. How studiously the Federal courts have protected this national asset is strikingly shown by the recent Shreveport case, 234 U. S. 342, wherein the attempt of one State ingeniously to discriminate against commerce from another was summarily set at naught.

It will not do for defendant in error to answer this conclusion by saying that at the time the Constitution of 1879 was adopted Congress had not passed the Interstate Commerce Act and had not attempted to regulate rates and prohibit discrimination as to interstate and foreign commerce. The fact remains that it has since done so, and that, having entered the field of regulation of interstate rates and prohibition of discrimination as to interstate shipments, it has completely occupied that field, to the exclusion of any State interference therewith, and that any State legislation which is so framed that it attempts to encroach upon the congressional domain, and wherein such attempt is so interwoven with what the State might lawfully do that the two cannot be separated, will necessarily be declared invalid. A dormant National power cannot be foreclosed by State action. Witness the United States Bankruptcy Act.

It must be recalled also that all of the shipments forming the subject of the one hundred and twenty causes of action herein moved within two years prior to the date of the filing of the complaint on January

14, 1913, and at a time after the amendment to the long and short haul clause of the Act to Regulate Commerce (June, 1910), and after the regulation of interstate commerce by Congress under the Commerce Clause had taken full force and effect.

An interesting and recent case on the question of the inseparability of the provisions of a statute which attempts to regulate both interstate and intrastate commerce is that of *Erie R. R. Co. v. New York*, 233 U. S. 671, which reversed the judgment of the New York Court of Appeals in *People vs. Erie R. R. Co.*, 198 N. Y. 369. The New York statute under consideration is printed as a foot-note to page 675 of 233 U. S. It attempted to regulate the hours of labor of block system, telegraph and telephone operators and signal men on surface, sub-way and elevated railroads. After describing the kinds of labor intended to be covered by the act, it said: "It is hereby declared that eight hours shall constitute a day of employment for all laborers or employees engaged in the kind of labor aforesaid."

At the same time there was in existence the familiar Federal Hours of Service Act, passed by Congress under the commerce clause, which fixed the hours of labor of telegraph and telephone operators engaged in interstate commerce at nine hours per day. It was thought by the New York Court of Appeals and so decided that the eight hour provision in the New York statute might be sustained even as to operators handling interstate trains on the theory that the State had merely supplemented an

action of the Federal authorities, and had raised the limit of safety; and also that the form of the Federal statute, "although not expressly legalizing employment up to that limit, seems to have invited and to have left the subject open for supplementing said legislation if necessary." Said the United States Supreme Court in reversing the judgment:

"We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.

"Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads."

The Court then, on page 685 of 233 U. S., quotes, apparently with approval, the language of the New York Court of Appeals, on page 376 of 198 N. Y.

"That the Labor Law purports and attempts indiscriminately and inseparably to regulate the hours of the classes of employees designated whether engaged in interstate or local traffic, and that, therefore, its validity must be tested by the power of the legislature over the former."

We submit that Section 21 of Article 12 of the California Constitution of 1879 is much more vul-

nerable to attack on the ground that it attempts to regulate interstate commerce, than are the New York statutes just referred to, in as much as the California section in its first sentence in terms prohibits discrimination against persons, passengers or freight "within the State or going to or coming from other States." It may be noted at this point that when the people came to adopt an amendment to Section 21 of the California Constitution, on October 10, 1911, the invalidity of the Section was observed and, the amended section prohibits discrimination in charges or facilities merely "for the transportation of the same class of freight or passengers within this State," and as the so-called long and short haul principle is concededly directed against a particular form of discrimination, it is, we think, quite clear that the amended Section 21 endeavored to and did confine its operation merely to California intrastate movements. This view is strengthened by the proviso in Section 21 that the California Railroad Commission may authorize the charging of less for longer than for shorter distances. Of course, taking the section as a whole, it is apparent that there was no idea on the part of the framers of the section that the Commission therein referred to had any power to grant relief as to interstate rates, such relief being covered by the amended Section Four of the Act to Regulate Commerce. But taking the old Section 21 as a whole, it is equally clear that the framer intended to regulate interstate as well as intrastate charges.

We submit, therefore, that in the light of the foregoing decisions there is no reasonable ground for a judicial declaration that the people of the State of California would have adopted the constitutional provision now under consideration if they had known that it would be void as to interstate commerce and that railroads might continue to exercise this form of discrimination as to interstate commerce, untrammelled by any regulation, save that which Congress saw fit to authorize.

It must be remembered that at the time the California Constitution of 1879 was adopted we had no Interstate Commerce Act, and that the long and short haul provision of the Interstate Commerce Act was originally enacted in 1887 and amended in 1910. It may be argued by defendant in error that at the time the California Constitution of 1879 was adopted Congress had not entered the field of rate regulation or of legislation against the form of discrimination prohibited by the long and short haul clause, and therefore that it was competent for the State to act. Yet even if the incorrect assumption be made that the State in 1879 could regulate interstate commerce, it seems to us that the suggested argument is susceptible of two answers: *first*, that it cannot be presumed that the people would have adopted a section of the Constitution which attempted to regulate interstate commerce, knowing that the moment Congress acted with respect to that particular form of discrimination a vital and inseparable part of the section would immediately be abrogated; and, *second*, that when Congress did act, thus abrogating a vital

part of the section—a part inseparable from the other provisions—the whole section, because of this inseparability, falls to the ground.

Thus far on this branch of the argument we have referred merely to the first general class of claims, those arising prior to October 10, 1911, but it would follow necessarily that if Section 21 of Article XII as it stood on October 10, 1911, were void as an attempt to regulate interstate commerce, then there could be no possible excuse, considering the provisions of Section 22 of the same article, giving the Railroad Commission the power to establish rates which should be conclusively just and reasonable, for contending that the rates which had been established by the Commission—as we endeavored to show and were prevented from showing—and which were in existence on October 10, 1911, were, on that date at least, the legal rates.

It then becomes necessary to consider—assuming the invalidity of Section 21 of Article XII—whether, by the amendment to the California Constitution effective October 10, 1911, rates theretofore legally existing, which violated the long and short haul clause in the amended Section 21, immediately and automatically became excessive and the subject of action to recover the difference. This necessitates reference to the provisions of the amended Article XII hereinbefore quoted.

The Court will observe that while in Section 21, Article XII, as amended October 10, 1911, it is provided that it shall be unlawful for a railroad to

charge a greater compensation for a shorter than for a longer distance over the same line or route, and while an application to the Railroad Commission and its permission after investigation is also provided as a relieving clause, Section 22 of the same Article, as amended at the same time, specifically provides that the Railroad Commission Act of California, approved February 10, 1911, shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently therewith.

The preceding portion of Section 22 as so amended states that no provision of the Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein, which are not inconsistent with the powers conferred upon the Commission; and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of the Constitution.

This "plenary clause" was construed by the California Supreme Court in *Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, hereinafter considered.

It will thus be seen that the concluding portion of the amended Section 22 not only refers to but adopts as a part of itself the provisions of the California Act therein referred to, which must be con-

strued not only as a part of the amendment to Article XII but also as though it had been passed when the Legislature under the amended Section XII had power to confer on the Railroad Commission additional powers "of the same kind or different" from those conferred by the constitution as amended.

The Act so adopted by the amended Section 22 is popularly known as the Eshleman Act, effective February 10, 1911 (chap. 20, Cal. Stat. 1911, amended by chap. 386 Cal. Stat. 1911, in respects not relevant to this case).

Section 15 of the Eshleman Act gives the Commission power and makes it its duty to establish rates of charges for the transportation of freight and passengers by all railroads or other transportation companies subject to the provisions of the Act, which must be read with the plenary provision of the amended Section 22 "unlimited by any provision of this constitution."

Section 16 provides for the record at the office of the Commission of all rates so established, and provides that if the railroad company upon establishment of rates by the Commission shall not avail itself of the opportunity to be heard, the rates so established shall be conclusively just and reasonable. It dispenses with notice by the Commission to a carrier of the adoption of schedules filed by the carrier.

Section 17 provides for the filing and promulgation of tariffs, and Section 18 provides that "All rates of charges for the transportation of passengers and freight, and all classifications established by the

Commission shall remain in effect until changed by the Commission.”

Section 22 provides that it shall be discrimination for a railroad to charge any greater, less or different rate than that established by the Commission.

It would seem, therefore, that, inasmuch as the provisions of the Eshleman Act above referred to were by the amended Article XII expressly made a part of that article, the charges established by the Commission and existing on October 10, 1911, were, by the constitutional amendment above referred to, expressly held in effect until changed by the Commission. It would follow logically that if the old Section 21 was void as under this point argued, or if, as we shall presently argue, the Commission nevertheless had the power to establish rates deviating from the provisions of that section, in either event the rates existing on October 10, 1911, were the rates lawfully to be collected by the carriers, not to be deviated from, under the penalties prescribed by the Act, and were the only rates which a railroad company lawfully had the right to collect. Obviously no action upon any theory of excessive charge could be maintained for the collection of such rates.

Thus the action of the trial Court in excluding the evidence of the witness Gomph, tending to show what rates were in effect on October 10, 1911, and what rates had theretofore been legally established by the Commission, was erroneous also as to the claims arising after October 10, 1911, because by the Court's rulings we were precluded from showing

that those claims were based upon rates actually established by the California Commission, which at the time of the collection had not in any manner been changed by the Commission, but which, on the contrary, had been reaffirmed by it by the chain of orders offered in and excluded from evidence, to which we shall shortly refer.

## II.

*To give the long and short haul clause of the old Section 21 the inflexible operation contended for by defendant in error, or to give the long and short haul clause of the amended Section 21 the immediate and automatic operation contended for by defendant in error, would in either event be violative of the provisions of the Federal Constitution, by depriving the plaintiff in error of property without due process of law, and by depriving it of the equal protection of the law.*

In the first, second and third separate defenses of the plaintiff in error, beginning at page 337 of the printed record, it is alleged that the rates by rail between San Francisco and Los Angeles, on all of the commodities referred to in the complaint, are through rates, which have been forced down below a reasonable rate for the service by reason of actual water competition between the port of San Francisco and the ports of Los Angeles, and that to compel the plaintiff in error to carry property to intermediate points at less than a reasonable rate for the service rendered and at such through rates would be to require it to establish such intermediate rates

at less than a reasonable compensation for the service performed, would deprive it of its property without due process of law, would deprive it of the equal protection of the law, and would compel it to devote its property to public use at less than a reasonable return on the fair value of its property so devoted.

In the second separate defense (Record p. 339) it is also stated that the effect of Section 21, Article XII of the California Constitution before it was amended was to arbitrarily establish said forced and compelled through rates as intermediate rates against defendant, without due process of law.

The District Judge sustained the general demurrers to each of these defenses, but on the trial (Assignments of Error, Record p. 531) the plaintiff in error offered to show by the witness then on the stand—one J. K. Butler, its Assistant General Freight Agent—that in his opinion as a freight traffic man the rates charged to plaintiff's assignors in this case were reasonable in and of themselves for the service performed, and that the through rate contended for by plaintiff was a rate less than a reasonable rate in and of itself for the service to be performed under the through rate, and was compelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles.

By the two rulings complained of we were prevented from showing either that the rate sought to be enforced at the intermediate points was a less than reasonable rate, or that the through rate which

was attempted to be applied to it was a rate compelled by water competition to be maintained on a less-than-reasonable basis.

In the case of Louisville & Nashville R'y Co. vs. Kentucky, 183 U. S. 503, the Court said (page 510):

“To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, *and such deprivation takes place in the absence of an investigation by judicial machinery*, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other persons

are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. *Stone vs. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Chicago, Milwaukee & St. Paul Railway Co. vs. Minnesota*, 134 U. S. 418; *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth vs. Ames*, 169 U. S. 466; *Lake Shore & Michigan Southern Railway Co. vs. Smith*, 173 U. S. 684.

“We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared in the present case that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for.”

The Supreme Court, however, has gone still farther since the date of the cases just cited, and has held in *Northern Pacific Ry. v. North Dakota*, 236 U. S. 585:

“But broad as is the power of regulation, the State does not enjoy the freedom of an owner.  
\* \* \* The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon a carrier and its property burdens that are not incident to its engagement. In

such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.

\* \* \* We have then to apply these familiar principles to a case where the State has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost, or without substantial compensation in addition to cost."

On page 598 the Court says that, while the Legislature has a wide range of discretion in the exercise of the power to prescribe reasonable charges,

"A different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account."

And further, the Court says that the cases cited in the note on page 600 of the official report furnish no ground for saying that the State may set apart a commodity or a special class of traffic, and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate.

On the same day the Court handed down its opinion in *Norfolk & Western vs. West Virginia*,

236 U. S. 605, in which it approved the North Dakota case and further held

“that the devotion of the property of the carrier to public use is qualified by the condition of the carrier’s undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.”

This is precisely what the effect of the old Section 21, Article XII, would be if it were given the inflexible operation contended for by defendant in error. It is furthermore exactly what the operation of the amended Section 21 would be if, as contended for by defendant in error, the long and short haul provision took effect immediately and automatically on October 10, 1911, without giving the carriers any chance to petition to the Commission for relief, and without giving the Commission any opportunity after a hearing to determine whether, and if so to what extent, relief should be granted, the latter determination, we take it, conforming to the accepted definition of due process of law.

In the first case—that of the old section—there was no process of law at all. The Constitution, according to defendant in error, used the through rate as a yard stick, no matter whether it might be reasonable or unreasonable at the intermediate

point, and no matter what might be the compelling traffic conditions, such as, in this case, water competition, which measured the utmost the carrier could charge for the through service.

The amended Section 21 endeavored to cure this manifest invalidity by vesting in the Commission the power to determine the extent to which the carrier might be relieved from the prohibitions of the long and short haul clause.

The learned District Judge, in his memorandum opinion on demurrer, says (Record, p. 364), in speaking of our claim that the inflexible enforcement of the long and short haul provision would operate to deprive us of property without due process of law:

“But that the enforcement of such a provision by the State is not repugnant to any right guaranteed by the Constitution of the United States, has been definitely announced in *Louisville & Nashville Railway Co. vs. Kentucky*, 183 U. S. 503, involving a substantially similar provision of the Kentucky Constitution, and the doctrine has been reaffirmed by that Court in the *Intermountain Cases*, U. S. vs. A. T. & S. F. Ry. Co., 234 U. S. 476.”

We respectfully submit, however, that the learned District Judge was in error in two respects: *first*, that the United States Supreme Court has never upheld the inflexible enforcement of a long and short haul clause—that is, an enforcement without any discretionary or relieving power being somewhere

vested; and, *second*, that the provision of the Kentucky Constitution passed upon in 183 U. S. 503 is not substantially similar to the provisions of the old Section 21 of Article XII of the California Constitution.

An examination of the Louisville & Nashville case we think will demonstrate this. In that case a writ of error issued to the Kentucky Court of Appeals, which had affirmed a judgment by which the railway company was sentenced to pay a fine of \$300 for violating a statute of that State which made it unlawful for a railroad

“to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.”

In respect to the words “substantially similar circumstances and conditions”, and also in respect to the general prohibition, the Kentucky statute was practically identical with the provisions of Section 4 of the Act to Regulate Commerce as originally passed in 1887, and as it stood until the amendment of June 18, 1910. At page 481 of 234 U. S., in the Intermountain Cases, the opinion reproduces a graphic comparison of the old and new Fourth Sections of the Interstate Commerce Act, enabling the section at a glance to be read as it was before and as it now stands after amendment.

The Kentucky statute, which was Section 820 and which was based upon Section 218 of the Constitution, is, with the constitutional section and the other Kentucky statutes, set forth in full in *McChord vs. Louisville & Nashville Railway Co.*, 183 U. S. 483.

Section 218 of the long and short haul statute contained a proviso (183 U. S. 489),

“that upon application to the Railroad Commission such common carrier \* \* \* may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property.”

Section 817 of the Kentucky statute defined discrimination.

Section 818 forbade preference or advantage.

Section 819 provided that in case of extortion or discrimination the carrier offending should be fined not less than \$500, etc., and should also “be liable in damages to the party aggrieved, to the amount of damages sustained.”

Section 820 provided a penalty for a violation of the long and short haul clause, still using the words “under substantially similar circumstances and conditions”, but provided that if the Commission was complained to it should investigate the grounds of complaint and might exonerate the railroad from the operation of the provisions of the section, but

that if it failed to exonerate the railroad the railroad company might be indicted for the offense.

In the Louisville & Nashville case, relied upon by the learned District Judge in the case at bar, it appeared that the indictment was found (p. 506) "not in advance of any action by the Railroad Commission, but on its recommendation," and the railroad company endeavored to defend by showing that the circumstances and conditions under which the charges were made were not substantially similar to those ordinarily obtaining. The Court said (p. 511):

"In the present case we have only to do with the question of the validity of the action of the Railroad Commission's proceeding under Section 820 of the statutes, which prescribe uniformity of rates for all distances, long or short, and make penal disregard of such uniformity by railroad companies, except when authorized by the Commission to charge less for longer than for shorter distances. \* \* \*

"The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws."

Throughout the opinion it is shown that the Court had in view (p. 508), *first*, the fact that the Supreme Court of Kentucky had held that the expression "substantially similar circumstances and conditions" did not imply that the carrier might be the judge, but that the law, taken as a whole, invested the Commission with the power to determine whether, and if so to what extent, the carrier might be relieved; and, *second*, that the carrier had had its day in court before the Commission, under the construction adopted by the Supreme Court of Kentucky, which was held to be binding upon the United States Supreme Court.

So that, in the Louisville & Nashville case we have, as to the rates there in question, a carrier which had submitted itself to a tribunal which was constitutionally vested with the power to determine the extent to which it might be relieved, and therefore the Court held, as it would doubtless hold under the provisions of the amended Section 21 of the California Constitution, that the carrier had not had these rates fixed without due process of law, but had had its day in court.

The Intermountain Rate Cases relied upon by counsel and cited by the Court in its memorandum opinion on demurrer in the case at bar are in 234 U. S., beginning at page 476. In these cases the Court points out the difference between the Fourth Section of the Interstate Commerce Act and the amended Fourth Section, stating that under the original Fourth Section the power was in the carrier

to meet competitive conditions by charging a lesser rate for the shorter than for the longer haul, but that that power, by the amendment, has ceased to exist because to do so in the absence of some authority would not only be inimical to the provisions of the Fourth Section but would be in conflict with the preference and discrimination clauses of the Second and Third Sections:

“But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, *and if not is in any event by necessary implication granted*. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the Second and Third Sections.”

We take it, therefore, that in the Intermountain Cases the Supreme Court recognized the principle we contend for here, that any legislation which, without affording the carrier an opportunity of a day in court, establishes rates which are confiscatory

or less than reasonable, or which ignore the compelling force of competition at the further point, operates to deprive the carrier of its property without due process of law, and to deprive it of the equal protection of the law; and furthermore that when this power of determination, instead of being vested in the carrier, is, under the provision, "under substantially similar circumstances and conditions", vested in a commission or other tribunal, the determination of the question must be had with due regard to the rights and property of the carrier. In other words, the tribunal being designated, it must act as a tribunal and not arbitrarily or capriciously.

If, with these principles in mind, one again takes up the Sections 21 and 22 of Article XII of the old Constitution, the difficulties thus apparent are easy of solution when the two sections are considered together as they should be. Considering the two sections together, it is manifest that it was their intention that the Railroad Commission described in Section 22, whose power and duty it was to fix rates which should be deemed conclusively just and reasonable, should endeavor, in prevention of discrimination, to fix such rates in conformity with the long and short haul provision of Section 21, but that if it did not see fit literally to obey that provision in all cases, its deviation therefrom was to be taken as an exercise of the relieving power, such as that found in the Kentucky Constitution, the amended section of the California Constitution, and Section 4 of the Interstate Commerce Act both as originally

passed and as amended. Only in this way can be prevented the confiscatory operation of Section 21, standing alone, which effect we have pleaded and offered to prove here. Only in this way can the two sections be harmonized, and the system of published and uniform rates contemplated both by the old and the new sections of the Constitution be carried out.

There is no greater difficulty, when we come to consider the provisions of the amended Sections 21 and 22. The framers of these sections knew that thousands of rates existed in the State of California which did not measure up to the standard of the long and short haul rule. It is inconceivable that they would have so framed the section as immediately upon its adoption to throw the entire rate system of California into chaos, and to make it impossible for either shipper or carrier to know what the legal rate was. It must be presumed, also, that the framers of the section were familiar with the provisions of the Eshleman Act, which were adopted by the section and which provide, as we have shown, that rates established by the Commission shall remain in effect until changed by the Commission.

We think it only a fair construction to say that it is the intention of the amended sections to permit the collection of the rates effective on October 10, 1911, until such rates are changed by the Commission either on petition of the carrier or on complaint filed by a citizen, or by voluntary action by the Commission, all three of which methods are avail-

able under both the Eshleman Act and the present California Public Utilities Act.

### III.

*The defendant in error had no right of action for the recovery of the difference between the greater charge for the shorter distance and the lesser charge for the greater distance, because*

1 *No such right of action existed at common law;*

2 *No such right of action has been conferred by any provision of the California Constitution;*

3 *No such right of action has been conferred by any California statute.*

*In this, an action at law, unless the case be founded upon at least one of the above mentioned classes, defendant in error is remediless.*

1 Has defendant in error a right of action upon any common law theory? We submit that it has not, both because in the case at bar it is neither alleged nor shown that the rate charged was unreasonable in and of itself, and, because it is neither pleaded nor shown that assignors of defendant in error, or any of them, or defendant in error itself, have been damaged by the collection of the so-called excessive charge.

Under the California system of jurisprudence all common law rights of action are preserved, except where such common law right of action is forbidden by statutory or constitutional provisions. (Sharon

vs. Sharon, 75 Cal. 13.) Common law rules though not forbidden by statute if unadapted to California conditions (*Katz vs. Walkinshaw*, 141 Cal. on p. 122, et seq) or inconsistent with our Constitution (*Hahn vs. Garrett*, 69 Cal. 147) do not obtain.

The essential elements of a common law action against a common carrier, based upon the exaction of an unreasonable charge, are fully considered and stated in the case of *Cowden vs. Pacific Coast Steamship Company*, 94 Cal. 470, annotated in 28 Am. St. Rep. 142 and 18 L. R. A. 221. The syllabi distinctly state the reasoning of the Court as follows:

“A complaint in an action by a shipper against a carrier, which substantially alleges that for the same quantity and character of freight the plaintiff was charged a greater amount for transportation from the same point than another merchant, but which does not allege that the charge to the plaintiff was unreasonable and excessive, does not state a cause of action at common law, and an allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge.

“Under the common law, a carrier is under no obligation to treat all customers equally, but he may carry for favored individuals at an unreasonably low rate, or even gratis, the law requiring only that he shall not charge any more than is reasonable. The fact that the carrier

charges others less is only evidence tending to show that the charge is unreasonable.”

We assume that in the case at bar the Cowden case should be considered as controlling on the question of whether in California, at least, an action may be maintained against a common carrier in which while it is alleged that for the same quantity and character of freight the plaintiff was charged a greater amount for transportation from a given point than another merchant to the same or another point, it is not alleged that the charge to the plaintiff was unreasonable and excessive; and that the case is also California authority to the point that an allegation of discrimination or inequality is not the equivalent of an allegation of excessive charge.

If authority, however, be needed in support of the doctrine so announced by the California Supreme Court, it may be found in the following American cases which are entirely consonant with the decision in the Cowden case:

*Penn. R. Co. vs. Coal Co.*, 230 U. S. 184-200;

*Johnson vs. Pensacola, etc., R. Co.*, 16 Fla. 623; 26 Am. R. 731;

*Ex Parte Benson*, 18 S. C. 38; 44 Am. R. 564;

*Cook & Wheeler vs. Chicago, etc., R. Co.*, 81 Ia. 733-6;

*C. & A. R. Co. vs. People*, 67 Ill. 11-18; 16 Am. R. 599;

*Sloan vs. Pacific R. R.*, 61 Mo. 24-32; 21 Am. R. 397;

*Peters vs. Scioto & N. H. R. Co.*, 42 Ohio 56,  
275; 57 Am. R. 814;

*Ill. & St. R. Co. vs. Beaird*, 24 Ill. App. 322.

It thus appears that at common law the defendant in error cannot base its action on the theory that it is suing for the collection of a charge unreasonable in and of itself for the service performed. We do not anticipate that any such claim will be made in the brief of the defendant in error, or on oral argument. We will next consider whether any form of action on the case lies in favor of the defendant in error on the facts alleged and proven. In this connection it will be observed that the complaint contains no allegation of general or special damage and that no proof of any general or special damage was offered or admitted. In fact, as most of the assignors to the defendant in error seem to be mercantile firms which have probably passed on their so-called excessive charge to their customers, the reason why special damage is not alleged is quite apparent. It is, we feel, unnecessary to cite authorities to support the statement that at common law case will not lie without both an allegation and proof of special damage, or a statement of fact from which the Court will imply general damage. The Court will not do so here (230 U. S., pp. 204-205) nor at common law did trespass on the case lie merely for the carrier charging one person more than another for the same service. (230 U. S., para. 4, p. 200.)

Nor will an action lie to recover money had and received since the carrier is prohibited by Section

22 of Article 12 of the California Constitution, as it existed both before and after the amendment of October 10, 1911, and by the provisions of both the Wright and Eshleman Acts and the present Public Utilities Act, on pain of severe penalties, from paying rebates or drawbacks from its published rates.

Therefore an action upon a common count as and for money had and received will not lie since it was not only not the duty of the carrier to restore the money but on the contrary was its duty not to restore it. Nor can the theory of money had and received be tenable as for money which in (equity and good conscience) ought to be restored because equity and good conscience alike forbid violation of substantive legal prohibitions. In this connection we will presently refer to the defense of "voluntary payment".

2 Has defendant in error any right of action created by the Constitution of the State of California? We think we have shown by the citation of Section 12 of the California Constitution as now in effect and as it existed in the Constitution of 1879 that the framers of the Constitution did not in terms give to any person aggrieved by the violation of the so-called long and short haul clause either as it stood originally or as it was carried into the amendment, any constitutional right of action therefor as distinguished from a right of action existent at common law or created by statute. In fact the Legislature has expressly negated such an idea by predicating

the legislatively created right of action on a showing of damages, and also by the Eshleman Act, which became effective February 10, 1911, providing in Section 32 a penalty recoverable by the State and not by an individual for the failure or refusal of a railroad company to perform any duty enjoined upon it by the Constitution for which a penalty has not been provided by law.

We also beg to remind the Court at this point that we have shown that this provision for a penalty recoverable by the State together with all other provisions of the Eshleman Act was carried into and expressly made a part of the amended Article 12 of the California Constitution, which took effect October 10, 1911. Therefore we say that Section 21 of the Constitution as so amended is to be read and considered as though it said "it shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or road, in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as to other rate than the aggregate of the intermediate rates. Provided, however (Sec. 32, Eshleman Act), that if it does charge or receive such greater compensation, for every such violation of the provisions of the preceding clause it shall pay to the State of California a penalty of not less than \$500 nor more than \$2000".

This brings us then to the point that where a constitutional provision prescribes a remedy or penalty for its violation, that remedy or penalty is exclusive. If it does not prescribe a remedy or penalty and no remedy or penalty exists under the common law or under a statute, an individual injured by a violation of the statute has no right of action. The principle is illustrated by numerous cases. In the case of *Ward vs. Severance*, 7 Cal. 126, a case not since reversed or modified, the Court says:

“Where a new right is created by statute, the party complaining of its violation is confined to his statutory remedy so far as the Courts of Common Law are concerned. If, however, the right existed at common law, the remedy provided by statute is merely cumulative.”

We think we have shown that at common law a person who has been charged more for the short haul than someone else had been charged for the long haul had no right of action either in assumpsit or on the case merely because he had been charged the greater amount; that unless he could show that the rate charged was unreasonable in and of itself for the service performed and that such unreasonable rate had been exacted from him, he was without remedy at common law. It is also familiar learning that the long and short haul principle is one of American creation and did not exist at common law. Therefore when the framers of the California Constitution attempted to make the long and short haul provision a part of the constitutional scheme for

regulation of rates, they at most created a new right, and when under the provisions of Section 24 of Article 12 of the Constitution of 1879, that "The Legislature shall pass all laws necessary for the enforcement of the provisions of this article" the Legislature did pass the series of acts hereinbefore referred to, and in those acts not only did not give a shipper the right to recover damages for violation of the long and short haul admonition, but on the contrary provided in Section 32 of the Eshleman Act, carried forward as we have shown into the amended Section 12 of the Constitution, that for the failure to obey a provision of the Constitution a railroad should be fined at the suit of the State, it seems clear that by both silence and direct exclusion the right of action claimed by the defendant in error is unsustainable. In point are a few of the many cases on the question of the creation of a new right and exclusiveness of the remedy.

The Supreme Court of New York in the case of Savings Association vs. O'Brien, 51 Hun. 45, said, quoting from the case of Pollard vs. Bailey, 20 Wallace U. S. 526:

"The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. \* \* \* In this case the liability and the remedy were created by the same statute; this being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by a common law action, but where

the provision for the liability is coupled with a provision for a special remedy that remedy and that alone must be employed."

In the case of *Dudley vs. Mayhew*, 3 N. Y. 9, the Court of Appeals of New York said, speaking of the common law remedy for infringement of a patent:

"The question wholly depends upon the point, whether it be a right newly granted or not. If it was, then it would receive its birth, duration and remedy from the statute and no other remedy could be pursued."

The Supreme Court of Michigan, in the case of *Thurston vs. Prentiss*, 1 Michigan 193, in discussing a statute prohibiting usurious interest contracts, said:

"The statute gives the only remedy and the parties are confined to it. The contract was made in reference to it and even if the remedy by statute was repealed, yet the parties would not be entitled to a remedy in a Court of Equity or by an action for money had and received."

The New York Court of Appeals in the noted case of *Jessup vs. Carnegie*, reported in the 80 N. Y. 441, says:

"The rule is no doubt well understood that where the remedy is a statutory one and a new right given and specific relief prescribed for a violation of such right, the remedy is confined to that which the statute gives."

In the case of *Young vs. Kansas City, etc., Ry. Co.*, 33 Mo. App. Rep. 509, the Court, in speaking of a Missouri statute regulating railroad charges, said that the statute repealed the common law and provided minutely for all questions which might arise concerning compensation for the transportation of freight. Judge Ellison said:

*“The legislature has revised the whole subject of the carriage of freight and has evidently intended that the provisions of the statute shall be a substitute for the common law on this subject, this being, as we have said, one of the frequent ways in which a repeal may be had.”*

This case is well worth examination in the present inquiry.

A classic on this subject is that of *Almy vs. Harris*, 3 N. Y. Common Law Reports, 985; 5 Johnson 175. This was an action on the case for the disturbance of the enjoyment of a ferry across the Cayuga Lake. The Court took jurisdiction of the case by certiorari directed to the Justice's Court wherein the action was brought. The Court said:

*“There is one error which we consider fatal, and for that we think there must be a judgment of reversal. The Act to Regulate Ferries within this State (20 Sess. Ch. 64, Sec. 1) prohibits any person, except within the southern district, the Counties of Orange and Clinton, from keeping or using a ferry, for transporting across any river, stream, or lake, any person or persons, or any goods or merchandise, for profit or hire,*

unless licensed in the manner directed by that act under a penalty of five dollars

“If Harris had possessed a right at the common law, to the exclusive enjoyment of this ferry, then the statute giving a remedy in the affirmative, without a negative expressed or implied, for a matter authorized by the common law, he might, notwithstanding the statute, have his remedy by action at the common law. (1 Com. Dig. Action on Statute, C.) But Harris had no exclusive right at the common law, nor any right but what he derived from the statute. Consequently, he can have no right, since the statute, but those it gives; and his remedy, therefore, must be under the statute, and the penalty only can be recovered.”

In the case of Mack vs. Wright, 180 Pa. St. 472, there was considered a Pennsylvania statute making it the duty of persons constructing buildings to cover the floor joists during construction so that workmen would not fall from one floor to another. The plaintiff's husband would not have been killed had the statute been observed, though it was conceded that no common law negligence of the employer was shown. The plaintiff sued *on the statute* which did not in terms confer a right of action other than a penalty recoverable by the State. The Court said:

“When the Legislature has imposed a new duty and intended that there should be cumulative remedies for the breach of it, it has usually,

if not uniformly, said so in plain terms. The inference is that if the Legislature had intended that, in addition to the penalty imposed by the statute, a party injured by such non-performance should have an action for the damages sustained thereby, it would have said so."

In the case of *Grant vs. Slater Mill & Power Company*, 14 R. I. 380, the Court, in speaking of a building ordinance which required fire-escapes and in discussing a case in which the plaintiff was injured by reason of the absence of a fire-escape, said:

"It was no part of the scheme of this act to create any duty which was to become the subject of an action or suit of individuals and, therefore, no remedy for individuals beyond that which is expressly given should be implied for any mere negligence of the duties imposed by the act."

In *Burbank vs. Bethel Steam Mill Co.*, 75 Maine 373, the Court said in discussing an action to recover damages for the burning of property caused by the use of a stationary steam engine which was erected and used without a license:

"The act was merely a police regulation declaring that a stationary steam engine erected without a license should be deemed a common nuisance; it gave no action to any person injured by it; his right of action, if any, was at common law."

In *Janney vs. Buell*, 55 Ala. 408, the Court said:

“At common law there was an appropriate remedy for the enforcement of every right; and if there was no adequate legal remedy the Court of Chancery supplied the defect. But this principle applies only to common law rights and does not extend to rights created by statute for the enforcement of which the statute itself provides a specific though inadequate remedy.”

This case has been followed in a number of Alabama cases ending with *Sheffield City Company vs. National Bank*, 131 Ala. 188; 32 Southern 598. The same Court held in *Chandler vs. Hanna*, 73 Ala. 390:

“When a right is solely and exclusively of legislative creation, when it does not derive existence from the common law or from the principles prevailing in Courts of Equity, and jurisdiction of itself is limited to particular tribunals and specific, peculiar remedies are provided for its enforcement, the jurisdiction and remedy being bounded by the statute can be exercised and pursued only before the tribunals and in the mode the statute provides.”

In the case of *Ryan vs. Ray*, 105 Ind. 101, it was said by the Supreme Court in speaking of a statute regulating banks:

“The Legislature having provided a complete remedy through an officer of the State who has been given a general supervision over the affairs of savings banks, no reason is apparent why

the rule should not apply that the remedy thus provided is exclusive of all others.”

To the same effect is the case of *Cole vs. City of Muscatine*, 14 Iowa 296, and the cases cited therein.

A familiar illustration of the extent to which the Courts have applied the doctrine of the exclusiveness of the prescribed remedy is found in a line of cases arising in the Eastern States where municipal ordinances have been passed requiring the removal of snow and ice from side-walks, and where actions for personal injuries have been brought without any pleading of negligence on the part of the lot owner, but merely in reliance upon the fact that the lot owner had violated the ordinance and that, therefore, a right of action inured to the benefit of anyone injured by reason of this violation. It has been, we believe, uniformly held that where a penalty is prescribed by an ordinance, the ordinance may, in some cases, be admissible on the issue of negligence, but that an action by the injured party must be on the ground of the lot owner's negligence and not on the ground of the lot owner's disobedience of the ordinance. Examples of these cases are:

*Fielders vs. North Jersey St. Ry. Co.*, 68 N. J. L. 343; 96 Am. St. Rep. 552;

*City of Hartford vs. Talcott*, 48 Conn. 525; 40 Am. Rep. 189;

*Taylor vs. Lake Shore, etc., Railroad Co.*, 45 Mich. 74; 40 Am. Rep. 457;

*Heeney vs. Sprague*, 11 R. I. 456; 23 Am. Rep. 502.

3 Having, as we believe, shown that the defendant in error neither pleaded nor proved any common law or constitutional right of action, we will now inquire whether by virtue of any California statute defendant in error has any right of action on the pleadings and proofs.

The first matter to be observed is that in each of the 120 causes of action pleaded in the complaint, plaintiff below merely said that on a certain day its assignor had been charged more for a certain shipment to a certain station of delivery from a certain point of origin, than the defendant below was then charging from the point of shipment to a more distant point in the same direction, and that the difference between the amount paid and the amount which would have been paid if the through rate had been charged was "an excessive charge". Nowhere is it alleged in any of the 120 counts or in the prayer for relief, that either the plaintiff below or any or all of its assignors had suffered financial loss or pecuniary damage in any amount whatever by the collection of this so-called excessive charge. For all that appears the assignors may have passed the charge along to customers as does a shipper who buys a commodity from a wholesaler in bulk and sells it to retailers, add to his wholesale price the cost of freightage and other overhead expenses of conducting the business as well as a profit on the transaction.

The Interstate Commerce Commission has held in many cases that the doctrine of reparation does

not obtain in such a case where the charge has been passed on to others by the person paying it to the carrier, and where such person has not shown any damage to himself. It is our contention that in any statutory right of action upon which the defendant in error may rely it is incumbent upon it both to plead and prove damage, and that nowhere in the California statutes is a right of action given a shipper against a carrier, except on the theory of a damage suffered by the shipper. Use of the word damage in the California Statutes to which we shall presently refer, is exactly the same as that word is used in Section 8 of the Act to Regulate Commerce, which provides that in case any common carrier, subject to the Act, shall do any act, matter or thing prohibited by the Act or declared by it to be unlawful, the carrier shall be liable "to the person or persons injured thereby for the full amount of damages sustained".

Of an action under that Section the Circuit Court of Appeals of the 8th Circuit said in *Knudsen & Co., vs. Michigan Cen. Ry.*, 148 Fed. 969, page 974:

"To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the commission. It is not every imperfect or inaccurate specification of rates

in the schedules that will give to a shipper a cause of action for damages. He must show, either that there *has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him*. The plaintiff here, having founded his cause of action upon a technical construction of the law, and without the basis of any ruling or order of the commission, seeks to recover without proof of pecuniary damage.” \* \* \*

“There is no presumption that rates specified in official schedules are unjust and unreasonable. The record before us discloses no finding and ruling of the commission against the reasonableness of the rates, and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage, there can be no recovery.”

The doctrine of the Knudsen case is also approved by Mr. Justice Lamar on page 207 of the opinion in Penna. R. Co. vs. International Coal Co., 230 U. S. 184, in addition to which he says:

“On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage

in favor of the plaintiff. But, as said in *Parsons vs. Chicago & N. W. Railway*, 167 U. S. 447, 460, construing this section (8) 'before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury'. Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government." \* \* \*

"The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record."

Our citations of the California statutes known as the Eshleman Act and the present California Public Utilities Act, both show that the existence of damages is necessary before any right of action

upon any theory for the recovery of money can be maintained by a shipper. Section 28 of the Eshleman Act providing for reparation orders, by the Commission, provides that a carrier may be called upon "to pay and satisfy the damage done to the complainant", and provides, "that all damages awarded by the Commission" may be collected by action therefor. The same section further provides that its provisions shall not be deemed to abridge or affect the right of any person to institute in any court any character of action against any railroad "for any wrong or damage". Section 43 provides that if a railroad company violates any provision of that Act, it shall be liable to the person "injured thereby for the damages sustained," and if the company is guilty of discrimination, it shall then "in addition to such damages" be liable in punitive damages.

This action was brought January 14, 1913 (Record, p. 333).

The California Public Utilities Act, effective March 23, 1912 (Chapter 14, Statute Special Session 1911), had superseded the Eshleman Act. The penal provisions material here are Sections 73 (a), 74 (a), 76 (a), and 80, which read as follows:

Section 73 (a):

"In case any public utility shall do, cause to be done, or permit to be done, any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the consti-

tution, any law of this State, or any order or decision of the commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the Court shall find that the act or omission was willful, the Court may, in addition to the actual damages, award damages for the sake of example and by way of punishment. An action to recover for such loss, damage or injury, may be brought in any Court of competent jurisdiction by any corporation or person.”

Section 74 (a) :

“This act shall not have the effect to release or waive any right of action by the State, the commission, or any person or corporation for any right, penalty or forfeiture which may have arisen or accrued, or may hereafter arise or accrue, under any law of this State.”

Section 76 (a) :

“Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than \$500 nor more than \$2000 for each and every offense.”

## Section 80:

“Actions to recover penalties under this act shall be brought in the name of the people of the State of California \* \* \*.”

The Court will observe that in Section 73 (a) violation of the Constitution makes a public utility liable to the persons or corporations affected thereby “for all loss, damages or injury caused thereby”. Section 76 continues, in effect, a provision of Section 32 of the Eshleman Act, by providing a penalty of not less than \$500 nor more than \$2000 for violation by a public utility of a provision of the California Constitution. Section 80, provides that an action to recover such penalty, shall be brought in the name of the State. Therefore we repeat that there is nowhere in the statutes of the State of California, either as they existed at the time the shipments in question moved or as they existed at the time this action was brought, January 14, 1913, any provision of any statute of the State of California conferring upon the assignors of the defendant in error any right of action under any theory whatever for the collection of the rate alleged herein to be excessive, unless such assignors could and did plead and prove that they had been damaged or pecuniarily injured by the collection of the rate in question.

And we go further and say not only is there an absence of any statutory theory for the collection of the so-called excessive charge merely on the allegation without an allegation of damage that it had been collected, but also that the Legislature by

expressly providing, as we have shown that damage is the essential element of every action to recover for the violation either of the provisions of the Constitution or of the Railroad Commission acts, has effectively foreclosed any claim that may be made by the defendant in error that it is relying upon the common law liability or a common law right of action. This statement we make on the familiar principle that a statutory right of action comprehensively covering a given field is a substitute for common law rights of action theretofore existing.

In addition to this consideration we also again call the Court's attention to the fact that the Legislature so far from conferring any right of action upon the aggrieved shipper for the collection of the so-called excessive charge herein sued for, has seen fit, both by the provisions of Section 32 of the Eshleman Act and the provisions of Section 73 (a) of the present California Public Utilities Act, to provide that for the violation of a constitutional provision the suit is that of the State and not of the individual, which as we believe we have shown makes the State's remedy exclusive.

Section 21 of Article XII of the California Constitution of 1879 does not in terms confer any right of action upon any person aggrieved by a violation thereof. That is to say, it is, if not void, merely a constitutional admonition against a railroad's charging more for the shorter than for the longer haul under certain conditions. It was en-

forceable only by mandamus or suitable proceeding against the Commission on behalf of the community affected, and even if it were enforceable on behalf of a shipper aggrieved by its violation such shipper, as we have argued, must show pecuniary damage personal to him, which is neither pleaded, shown nor claimed here.

Section 21 of Article XII, after forbidding discrimination between places and persons, provides merely for the delivery of property at a station, at charges not exceeding the charges for the transportation of property of the same class in the same direction to a more distant station. It contains no penal provision, nor does it give the person aggrieved a right of action, and, as we have previously endeavored to show, unless such aggrieved person had a right of action by statute or at common law, he has no right of action at all. The essence of the so-called long and short haul legislation is that it is for the protection of communities, not for the protection of individual members of communities, unless by appropriate proceedings they can show that they have been personally damaged by the violation.

The long and short haul clause under consideration, as framed, is, we take it, merely an admonition to the Commission to observe that rule in establishing the conclusively just and reasonable rates provided for in the succeeding Section 22, which, when construed *in pari materia* with the provisions of Section 21, amount to a relieving clause against the rigid and inflexible enforcement of the rule in Section 21 contended for by defendant in error.

The question of enforceability of the old Section 21 came up before the California Commission in a contested matter—the case of Scott Magner & Miller vs. Western Pacific Railway Company, decided on April 12, 1913, reported in Volume II of the Opinions and Orders of the Railroad Commission of California, at page 626. In considering the provisions of the Constitution of 1879, and considering the provisions of Sections 21 and 22 *in pari materia*, the Commission said, in response to a suggestion that notwithstanding that rates in violation of the long and short haul provision had been established by the Commission prior to October 10, 1911, a shipper who had paid the greater rate for the lesser distance was entitled to reparation at the hands of the Commission, on the theory that the Commission had failed in its duty by establishing rates under Section 22 in contravention of the principle of Section 21.

“The system of State-made rates established by the Constitution of 1879 could not have contemplated a right to reparation except in case the carrier charged a rate in excess of that established by the Commission. In a scheme providing that the State itself establishes rates which shall be conclusively just and reasonable, there is no room for the doctrine of reparation, except as indicated. The fact that the Commission may have failed in its duty cannot change the law or create a new system.”

And further the Commission, on page 636, said, with respect to a claim that reparation might be had

at the hands of the Commission, on the ground that a Commission-made rate prior to October 10, 1911, was unjust and unreasonable:

“The framers of the Constitution of 1879, however, provided in Section 22 of Article XII that the rates should be established and published by the Railroad Commission and not by the carriers, and that the rates so established and published should be deemed in all proceedings, both civil and criminal, to be conclusively just and reasonable. It could hardly be held that a shipper could recover from a carrier for charging a conclusively just and reasonable rate—a rate, moreover, which the carrier was compelled, under heavy penalties, to charge. If the shipper were dissatisfied, he could apply to the Railroad Commission to alter the rate, but it would certainly be entirely at variance with such a system of State-made rates to hold that the Commission, in addition to making an order as to the just and reasonable rates to be thereafter charged, should also compel the carrier to pay remuneration for having charged the rate which the Railroad Commission compelled it to charge, and which, under the Constitution, became a conclusively just and reasonable rate. We are accordingly of the opinion that if the Railroad Commission had established defendant's rates, as it was its duty under the Constitution to do, no right to reparation could have arisen, on the theory of unjust or unreasonable rates on the facts as stated in this complaint

prior to October 10, 1911. The shipper's remedy would be to petition the Commission to alter the rate and then to sue the carrier if he failed to conform to the rate so established. The United States Supreme Court, in the cases of *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, and *Robinson vs. Baltimore & Ohio R. Co.*, 226 U. S. 506, has expressed its views with reference to the relation between the Interstate Commerce Commission and the courts in entire harmony with the views herein expressed as to the effect which the establishment of a system of State-made rates had on the common-law right to sue for damages by reason of the collection of an unjust or unreasonable rate."

That the Legislature of California has never considered that the provisions of Section 21 of the California Constitution of 1879 conferred a right of action upon an individual, irrespective of whether he pleaded and proved that he had been pecuniarily damaged, is shown by legislative history. The first Act was the so-called Wright Act, approved March 19, 1909 (Cal. Stat. 1909, p. 499; Deering's General Laws 1909, p. 1062). This provided a comprehensive system for the establishment of rates by the Commission.

Section 21 gave the Commission power to determine that a party complainant was entitled to an award of *damages* under the provisions of the Act, for a *violation thereof*, and provided for the enforcement of that order by a civil suit.

Section 31-d provided :

“No common carrier, subject to the provisions of this Act, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any such common carriers to charge and receive as great a compensation for a shorter as for a longer distance haul.”

Section 38, still carrying out the theory that an aggrieved shipper must prove and show damages, provided:

“In case any transportation company subject to this Act, or any person or corporation within the provisions hereof, shall do, cause to be done, or permit to be done, except unintentionally or innocently through a mistake of fact, any matter, act or thing in this Act prohibited or declared to be unlawful, or shall similarly omit to do any act, matter or thing herein required by this Act to be done, such transportation company, person or corporation shall be liable to the penalties hereinbefore provided for, and shall, in addition, be liable to the person or persons, firm or corporation injured by such act or omission, for the damages proximately

resulting therefrom; and in addition to such damages, such transportation company, in all cases where the same shall be guilty of extortion or unjust discrimination as defined in this Act, shall pay to such person, firm or corporation so injured a penalty of not less than \$500 and not more than \$5000."

And Section 40 would seem conclusively to cut off any private right of action based upon a violation of the constitutional provision in question, except by proceedings before the Commission and the courts, provided for in the Wright Act, in which proceedings, as we have shown, damages must have been proven:

"In all actions between private parties and transportation companies subject to the provisions of this Act, in respect to any rate, charge, order, rule or regulation published as required by this Act, the published rate, charge, order, rule or regulation shall be deemed to be just and reasonable, and shall not be open to controversy except in and by way of such proceedings for that purpose before the Commission and the courts as are provided for in this Act."

This so-called Wright Act was in effect at the time the tariffs referred to and which were attempted to be introduced in the testimony of the witness Gomph were established and approved by the Commission.

On February 10, 1911, the Eshleman Act (Cal. Stat. 1911), to which we have already referred, went

into effect. It still carried out the legislative theory of deprivation of a right of action by an aggrieved shipper who has been charged more for a shorter than for a longer distance, and goes farther by prescribing what shall be the penalty exacted of a railroad company violating either the provisions of the Act or the provisions of the statute. We have already referred to the sections of the Eshleman Act relative to the establishment by the Commission of rates, and the filing of tariffs, and the remaining in effect of those rates until they were changed by the Commission.

The penal sections of the Eshleman Act applicable here are Sections 22, 28, 41 and 43, so far as private rights of action are concerned, and in none of these is a shipper who has been charged a Commission-made rate for the shorter distance, which is in excess of the Commission-made rate for the greater distance, given any right of action. If under the sections just referred to he predicates his right of action upon having been damaged, it is clear that all of these sections require pleading and proof of such damage, which is entirely absent in the case at bar.

We have purposely passed over Section 32 of the Eshleman Act, which reads as follows:

“If any railroad or other transportation company doing business in this State shall fail or refuse to perform any duty enjoined upon it by this Act or by the Constitution of this State, for which a penalty has not been provided by

law, or shall fail, neglect or refuse to obey any requirement, order, judgment or decree made by the Commission, for every such failure, neglect or refusal it shall pay to the State of California a penalty of not less than \$500 nor more than \$2000. The Commission, in addition to any and all powers conferred upon it by this or any other Act or by the Constitution of this State, shall have the power to enforce any order or to enforce the performance of any duty enjoined upon any railroad or other transportation company, or officer or agent thereof, by proceedings for mandamus or injunction in any court of competent jurisdiction against any such railroad or other transportation company or officer or agent thereof. This method of enforcing orders or the performance of duties is cumulative of and in addition to any other method provided in this or any other Act or in the Constitution of this State,"

for the purpose of accenting the point that here, for the first time, the Legislature of the State of California prescribed a penalty for the violation by a railroad company of a duty enjoined upon it by the State Constitution. The only penalty, your Honors will observe, in Sections 21 and 22 of the Constitution of 1879 is that prescribed in Section 22 for failure to conform to the Commission-made rates, or failure to keep accounts in accordance with the system prescribed by the Commission. We may say, in passing, that the provision of Section 22 referring to private actions for charging excessive rates

clearly refers to the excessive rates next therein above referred to—that is, rates in excess of those established by the Commission.

Such then was the situation in California, both actual and historical, when the constitutional amendment of October 20, 1911, took effect. We feel that we have shown that neither by constitutional nor statutory provision was any right of action given a shipper for the mere charging of the greater rate for the lesser distance, provided the rate so charged had been fixed by the Commission; and further, that if it were a violation of the Constitution to charge a Commission-made rate for a greater than for a lesser distance, such violation was punishable only at suit of the State to recover a penalty in the nature of a fine.

It was suggested, rather than insisted upon that Section 73a of the California Public Utilities Act above referred to might have authorized a Justice of Superior Court to take and hold jurisdiction of plaintiff's cause of action.

Section 73a reads as follows:

“In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the constitution, any law of this State or any order or decision of the Commission, such public utility shall be liable to the persons or corporations affected thereby for all *loss, damages or injury*

caused thereby or resulting therefrom, and if the Court shall find that the act or omission was willful, the Court may in addition to the actual damages award damages for the sake of example and by way of punishment. An action to recover for such loss, damage or injury may be brought in any Court of competent jurisdiction by any corporation or person.”

It will be observed that this section is prospective and not retrospective. The act of which it was a part did not take effect until March 23, 1912.

At the time the shipment moved and at the time the charges were collected the California Act then in effect was the so-called Eshleman Act—Chapter 20 of the Statutes of 1911.

Section 38 of the Wright Act confers no right of action for damages save for violation of that act.

The section of the Eshleman Act corresponding to Section 73a of the present Public Utilities Act is:

Sec. 43:

“In case any railroad or other transportation company subject to this act shall do, cause to be done, or permit to be done any matter, act, or thing *in this act* prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad or other transportation company shall be liable to the person or persons, firm or corporation injured thereby *for the damages* sustained in consequence of such vio-

lation; and in case such railroad or other transportation company shall be guilty of discrimination as by this act defined, then, in addition to such other damages, such railroad or other transportation company shall be liable to the person, firm or corporation injured thereby in punitive damages in the sum of not less than one hundred dollars, nor more than five thousand dollars, to be recovered in any Court of competent jurisdiction in any county into or through which such railroad or other transportation company may run or operate; provided, that any such recovery as herein provided shall in no manner affect a recovery by the State of a penalty provided for such violation."

It would seem, therefore, to be manifest that a Court cannot found its jurisdiction upon any of the provisions we have just quoted, since the one in force when the action was brought was prospective and neither preservative nor declaratory of any right of action for damages arising out of a violation of a constitutional provision, and since also the law of March 23, 1912, does not even by the most strained construction purport to give any right of action for damages arising out of a violation of the Long and Short Haul provision of the Constitution.

It follows with equal certainty that Section 74a of the present California Public Utilities Act is of no avail to the plaintiff because it had no "right, penalty or forfeiture arising or accruing under any law of this State."

## IV.

*The Court erred in sustaining a general demurrer to the tenth separate defense of plaintiff in error (Record, p. 344) which pleaded that each assignor or defendant in error paid without protest the charge complained of, and that the charge was collected by defendant in the belief that it was the lawful rate and was the amount specified by tariffs duly established by the Railroad Commission, and in each case was no more than a reasonable compensation for the service performed.*

On this point we contend that payments voluntarily made of charges assessed contrary to the long and short haul clause of the State Constitution, even though that clause as originally enacted, or as amended, and giving it the full force contended for by defendant in error, can not be recovered by action in Court. We cite *Brumagin vs. Tillinghast*, 18 Cal. 269, the leading case in California on voluntary payments, and a case which has been very frequently cited and followed in this and other States.

A case very similar to the present one is *Killmer vs. New York Central*, 100 N. Y. 395, where the payments were sometimes made before the delivery of the goods to the consignee, and some times afterward, and were made without objection during a period of thirteen years without any complaint or remonstrance on the part of consignees or shippers. The New York Court of Appeals held that there could be no recovery, and in the course of the opinion referred to a number of English cases. One

of them, *Parker vs. Great Western*, 7 M. & G. 253, differs (p. 275) from the present case in that in the *Parker* case the plaintiff protested against the excessive charge, and tendered what he insisted was the lawful charge; in other words, he paid under protest, and in that case the Court held that the payments were not voluntary.

We also refer to the case of *Kenneth vs. Railroad Co.*, 98 Am. Dec. 382; 15 Rich. (S. C.) 294. In that case there was no protest, and the payments were held to be voluntary. The Court in the opinion reviews at some length the authorities on voluntary payments.

A recent case is that of *Hardaway vs. Southern Ry. Co.*, 73 S. E. 1020, decided by the South Carolina Supreme Court in 1912, wherein the Court says:

“It follows that when one undertakes to recover money which he has paid to another, he must allege and prove some fact or facts which will take his case out of the general rule above stated. Otherwise his complaint will be subject to demurrer for insufficiency.”

We cite also the cases of *Dubose vs. Railway Co.*, 50 Ga. 304; *Potomac, etc., Co. vs. Railway Co.*, 38 Md. 255; and *Knudson, etc., Co. vs. Railway Co.*, 149 Fed. 973.

In the case at bar defendant in error manifestly understood that there was a rule forbidding recovery of voluntary payments, for it attempts to meet the rule by the allegations of paragraph IV of each count, to the effect that a demand for the freightage

was made and that the money was paid before delivery of the goods. We submit, however, that under the decision of the California Supreme Court in *Hanford Gas & Power Co. vs. City of Hanford*, 163 Cal. 104, the allegations are not sufficient. First, it does not appear from the complaint that the assignors of the defendant in error had any interest whatever in the goods on which freightage was demanded. For aught that appears in the complaint, the plaintiffs may have been mere factors or commission men, or otherwise not interested in the case on account of any property, general or special, therein. The rule laid down in the *Tillinghast* case, 18 Cal. 269, is that a payment is voluntary unless made to protect the person or property of the payor. In the *Hanford* case just referred to the Court referring to several California cases, said on pages 112-13 of the opinion, that the general allegation as to menace, compulsion and coercion is not sufficient to show any of these characteristics.

We therefore submit that it was error for the District Court to refuse plaintiff in error the right to submit evidence in support of the allegations of its special defense No 10 (Record, p. 344).

## V.

*As to the shipments herein involved which moved after October 10, 1911, collection of the charges complained of can be defended on two additional grounds:*

1 *That the charges collected were those existent on October 10, 1911, having been legally established by the Commission.*

2 That the Commission did pursuant to the power given it by the Eshleman Act, Section 15, to fix rates, actually make a series of orders, some of them preceding the filing of petitions for relief from the long and short haul clause and some of them afterward, but all of them with the intention of preserving the status of the rates then being charged by plaintiff in error, until it could be determined by the Commission whether, and, if so to what extent, it was entitled to relief.

Under the first subdivision of the foregoing head we feel that we have already shown the Court that the amended Sections of Article 12, which took effect October 10, 1911, expressly adopted and made a part of themselves the provisions of the then existing Railroad Commission Act, the Eshleman Act, and that the provisions of this Act are to be considered *in pari materia* with the provisions of the amended sections to the Constitution, not as a mere supplement to those sections but as an integral part thereof. Therefore whereas by Section 15 of the Eshleman Act power is given to the Commission to fix rates, and by Section 18, hereinbefore quoted, it is provided that all rates established by the Commission shall remain in effect until changed by the Commission, it was evidently the intention of the Section not to give the long and short haul clause therein contained an immediate and arbitrary operation without giving the carriers an opportunity to apply for relief, and without giving the only relieving body the opportunity of making such detailed investigation of the rates involved as to it

seem fit and under its general rate fixing power meantime to preserve the status if it saw fit so to do.

An explanation of this somewhat unusual inclusion of an existing statute in a Constitution merely by reference to its title and date of passage is found in contemporary history. At the time the amendments to Article 12, which were submitted to the voters at the special election of October 10, 1911, were framed by the Legislature and submitted to the people for adoption, the Eshleman Act of February 10, 1911, had already been passed and was in effect. At the same session of the California Legislature in 1911, the Legislature prepared and presented to the people for ratification and adoption at the same special election, other amendments to the constitution, including therein a clause providing for the reference of legislative acts to the people for approval or disapproval by popular vote. These amendments were adopted on October 10, 1911. The referendum amendment is Section 1 of Article 4. In aid of the referendum theory, the referendum amendment provided:

“No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act,” except acts calling an election and urgency measures therein defined.

The Legislature was then in this situation: By the amendments to the Railroad Commission Sections, which it proposed to the people, it changed in many respects, the theory and method of railroad

and public utility regulation. By the referendum section, which was proposed at the same election, it provided in effect that no law in aid of the constitutional provisions respecting the Railroad Commission, should go into effect until ninety days after the final adjournment of the Legislature passing it. Therefore lest it might be successfully contended in the event of the adoption of the Railroad Commission amendments that that adoption worked an implied repeal of the then existing Eshleman Act, and in view of the possibility of the adoption at the same election of the referendum provision, which would have precluded the enactment and taking effect of a new Railroad Commission Act for at least the time required to convene the Legislature and pass the act, and in addition thereto ninety days thereafter within which referendum petitions might be filed, it was thought best to preserve the provisions of the Eshleman Act intact by making them a part of the constitutional provision, as was done, and holding them thereby in effect until the Legislature might supplement, change or modify the Eshleman Act by new legislation. This forethought on the part of the Legislature accounts for the fact that we find the Eshleman Act not only continued in effect after October 10, 1911, but in effect and by reference made a part of the amended Railroad Commission sections.

Therefore we take the position that the Court below erred in sustaining the demurrer of the defendant in error to the eighth further and separate defense (Record, page 343), pleading that the rates

charged and collected after October 10, 1911, were rates which prior thereto had been established by the Railroad Commission and had not been changed, and that the Court also erred in refusing to permit the plaintiff in error to show that such rates had been established prior to October 10, 1911.

Another reason why we believe that defendant in error has no cause of action as to the rates in question collected after October 10, 1911, is that we take the position that the Railroad Commission did after investigation grant relief against the amended long and short haul clause as to such rates as were covered by application filed within a prescribed time and continued such relief in effect pending the final determination by the Commission of the extent to which it should go, which final determination, as the record shows, had not been reached at the time of the trial.

The seventh separate defense of the plaintiff in error (Record, page 342) was to the effect that as to all such shipments the Railroad Commission had authorized the defendant after investigation to charge more for the shorter than for the longer distance. Demurrer to this defense was overruled and when plaintiff in error endeavored to sustain the defense on the trial it did so by offering a chain of orders and petitions, all of which are hereinbefore referred to, and all of which were on objection refused admission in evidence. The learned District Judge proceeded upon the theory that Section 21 of Article 12, as amended October 10,

1911, required for relief from its provisions, first, an application, and, second, an investigation by the Commission. The proviso in the amended Section 21 has already been cited: "Upon application such company may in special cases, after investigation" be authorized to deviate from the long and short haul provision.

The learned District Judge in the discussion which preceded the offering of this series of orders (Record page 397) stated that the investigation referred to must be upon application by the company, and apparently he believed that the Constitution required the investigation to follow the application and that it was not permissible for the investigation to precede the application.

Before briefly referring to the series of papers offered on this head, it might be well to consider that the Railroad Commission at the time of the adoption of the amendment of October 10, 1911, was a duly created and a fully organized body; that it had custody of and complete access to and presumed familiarity with all of the tariffs of all of the railroad carriers in so far as such tariffs applied to California intrastate movements, and that it was, as has many times been said by the Federal Courts of the Interstate Commerce Commission, presumably an expert body with unusual familiarity with rates and conditions. In other words the Commission was the repository of an immense amount of information bearing directly on the question of whether in various parts of the State special cir-

cumstances and conditions existed warranting its granting relief from the inflexible operation of the long and short haul clause.

The word "investigation," therefore, as we view it, does not and should not in this connection have a construction put upon it giving it the dignity of a formal proceeding or requiring it to be accompanied by the necessary elements of due process of law as applied to the determination of a contested question of law or fact. Nor we take it are the words "upon application" contained in the amended section to be given the strict construction, placed upon them by the District Judge so as to require application to precede investigation no matter what meaning may be given to the word investigation. Here is a body having jurisdiction of the subject of fixing rates. Those rates once fixed cannot be deviated from by a carrier and must be paid by the shipper or consignee. The shipper or consignee has no recourse except upon formal application to it as provided both in the Eshleman Act and in the Public Utilities Act, which succeeded that act. Upon such application the carrier is entitled to notice of the hearing and the opportunity to produce witnesses, thus fulfilling the requirements of due process of law. The Commission itself, however, in an investigation, as distinguished from its formal proceedings, is not so regulated and trammled. Considering the manifest injustice to the carrier of attempting to make an inflexible long and short haul clause take effect immediately on its adoption at an election held on a given date,

we submit no rigid construction should be indulged in to bring about such a result. Therefore we take it that the word investigation as here used should be given its broad and general sense and should not be construed to be equivalent to a formal proceeding. This view is borne out by the following cases:

In *Wright vs. City of Chicago*, 48 Ill. 285, there was considered a street assessment. Under the Illinois statute which provided that the Commission of Public Works should investigate whether there was any real estate specially benefited, in the Commissioner's report the word investigation was not used, but it showed that they found and established benefits, when or in what manner the facts not being stated.

Says the Court on page 290 of the official report:

"The fourteenth section of chapter 2 of the amended charter, does not require, for the purposes of investigation, that the commissioners of public works should go upon the ground, or streets sought to be improved, and there investigate. Full investigation of a subject, be it moral, political, or philosophical, can generally be better pursued in the closet than in the open air, in crowded streets. Eminent lexicographers define investigation to be the action or process of searching minutely for truth, facts, or principles; a careful inquiry to find out what is unknown, either in the physical or moral world, and either by observation and experiment, or by argument and discussion. Thus we speak of

the investigations of the philosopher and the mathematician; the investigations of the judge, the moralist, and the divine, and, may we not add, of boards of commissioners of public works?

“It must be presumed, these commissioners, as they were sworn to do, thoroughly investigated this matter in their office, and discussed, fully, the merits of the whole subject, knowing, as they are presumed to have known, all the peculiarities of the locality, and familiar with the subject.

“The result of their investigation was this report to the common council, accompanied by the required ordinance.” \* \* \* \* \*

In *Johnson vs. Railway Company*, 130 Wis. 492, the case of *Wright, supra*, is cited as a definition of the word investigation. The Court also says:

“No limitation was placed upon the manner of investigation or methods to be employed in obtaining information, and it appears that the investigation made was for the purpose of obtaining the desired information. ‘Investigation’ is defined: ‘To inquire into systematically; ascertain by careful research.’ *Stand. Dict.* 917. ‘To search out; to inquire into; to examine; to scrutinize.’ *Worcester, Dict.* 777. ‘To follow up; to pursue; to search into; to inquire and examine into with care and accuracy; to find out by careful inquisition.’ *Webster Dict.* 713.”

The evidence offered and rejected respecting the rates collected after October 10, 1911, was in brief, as follows:

1 Plaintiff in error endeavored to show by the Witness Gomph (Assignment of Error No. 8, Record page 516) that the letter shown the witness was a correct copy of a letter sent to the California Railroad Commission, on May 7, 1909, by the Southern Pacific Company, transmitting tariffs therein specified, and that those tariffs were filed with the Commission. The list of tariffs specified in the letter includes the tariffs evidencing all of the charges here in controversy.

2 Plaintiff in error offered to show by the Witness Gomph (Assignment of Error No. 9, Record page 517) the contents of such letter, which contained the numbers of said tariffs.

3 Plaintiff in error offered to show by Witness Gomph that all of the tariffs mentioned in said letter were actually filed with and remained on file with the Railroad Commission until the Commission entered an order on January 1, 1909, approving and establishing such tariffs. (Assignment of Error No. 10, Record page 527.)

4 Plaintiff in error then offered an order made by the Railroad Commission January 11, 1909 (Assignment of Error No. 11, Record page 527) in which receipt of the tariffs is acknowledged, and providing "That the said rates, fares and charges shall be published by said carriers respectively, as required by said Act, and shall be the lawful rates,

fares and charges of said carriers respectively.” (Record page 530.)

These four offers were preliminary to the chain of orders and applications made and filed after October 10, 1911, and were made to show what tariffs had been established by the Commission prior to October 10, 1911, and were in existence on that date so far as concerned the claims herein sued on.

5 Plaintiff in error then offered (Assignment of Error No. 2, Record page 481) a notice by the Railroad Commission, dated October 26, 1911, reciting the provisions of the amended Section 21 of Article 12, and ordering carriers which had schedules on file in violation of such provisions to file on or before January 2, 1912, if carriers desired to justify deviation from the long and short haul rule, an application or applications to be relieved from the provisions of the amended Section 21, the form of application being prescribed.

6 Plaintiff in error then offered (Assignment of Error No. 3, Record page 486) an order of the Railroad Commission, dated November 20, 1911, granting permission to carriers until January 2, 1912, to file such changes in rates and fares as would occur in the ordinary course of their business “*continuing under the present rate bases or adjustments higher rates and fares to intermediate points*”, and providing that in so doing discrimination against intermediate points would be not made greater than that in existence October 10, 1911.

7 Plaintiff in error then offered Southern Pacific Company's petitions No. 3, 9, 10, 30 and 40 (Assignment of Error No. 4, Record page 488), which were in the form prescribed by the Commission and covered the rates here in controversy. Each of these petitions asked for authority to continue higher rates at the intermediate points therein described than the through rates to more distant points. These petitions were filed on December 30, 1911.

8 Plaintiff in error then offered a copy of the Minutes of the California Commission of January 2, 1912, (Assignment of Error No. 12, Record page 506), showing that the Commission on that day did begin a general investigation of long and short haul rates in California, a number of the California carriers, including Southern Pacific Company, being represented. It appears from the record that this investigation has not yet been terminated.

9 Plaintiff in error then offered an order of the Railroad Commission, dated January 16, 1912 (Assignment of Error No. 6, Record page 507), which order extended until February 15, 1912, the time for filing applications for relief from the long and short haul provision, providing (Record page 509) that the railroads so filing *might continue under the present rate bases or adjustments higher rates or fares at intermediate points provided that in so doing the discrimination against intermediate points was not made greater than that in existence October 10, 1911.*

To all of these offers objection was sustained on the theory of the Court that these orders did not constitute an investigation within the meaning of the amended Section 21.

Closely analyzed there are three periods to be considered:

- 1 The period between October 10, 1911, when the amended Section 21 took effect, and November 20, 1911, when the order of the Railroad Commission was entered absolving carriers who filed applications from conforming their tariffs to the long and short haul provision, pending hearing of such applications.

- 2 The period between October 26, 1911, when the order next above referred to was entered, and December 30, 1911, when the plaintiff in error actually filed applications with the Commission covering all of the rates herein involved, which were collected after October 10, 1911.

- 3 The period between December 30, 1911, the date of the filing of such applications, and January 16, 1912, the date of the order of the Commission again extending relief to carriers who filed such applications until the Commission could determine upon the extent of the relief prayed for by said applications, and permitting continuance of higher intermediate rates.

It would seem clear, therefore, that by the order of November 20, 1911, the Railroad Commission, did, in so far as it had the power so to do, expressly authorize carriers who had on file or who

subsequently filed within the limits of the order, applications to be relieved, a continuance of the rates existing on October 10, 1911. It seems equally clear that on January 16, 1912, the Railroad Commission entered an order by which, in so far as it had power so to do, it confirmed the order of November 20, 1911, and at least held in suspense all rates embraced in applications for relief theretofore filed with it, and also established or re-established such rates, pending determination by it on such applications.

No matter what view the Court may entertain of the necessity of an application prior to the relief order under amended Section 21, it would seem that in as much as the applications of the plaintiff in error were on file on December 30, 1911, and as the Commission on January 16, 1912, entered the order above referred to, that as to every claim of the defendant originating after January 16, 1912, the Commission has after application and after investigation entered an order temporarily at least continuing the rates described in the application of December 30, 1911, in full force and effect. The order of January 16, 1912, appears clearly to be a relieving order, even adopting the construction of the Court below as to the applications which were then on file with the Commission. Those applications covered all of the cases here involved. We submit that the Court cannot presume that the Commission in making the order of January 16, 1912, acted capriciously or in disregard of its duties to the public or without investigation, and we repeat

that all of the investigation required by the amended Section 21, so far as this order is concerned, would be met by the investigation by the Commission itself, ex parte, made, from its own records and supplemented by its general knowledge of the California situation, and by the relief application on file with it.

If we be correct in saying that the order of January 16, 1912, amounted to a relief, after investigation, as to the rates specified in the applications filed by plaintiff in error on December 30, 1911, we next have to inquire as to the effect of the order of November 20, 1911, and this inquiry we make entirely irrespective of our point that the rates in existence on October 10, 1911, were preserved in force by the incorporation of the Eshleman Act in the Constitution.

Our inquiry now is solely addressed as to whether on November 20, 1911, at the time of the making of the order which continued in force higher rates at intermediate points as to such carriers who thereafter filed applications, *the Commission had in and of itself the power to fix rates pending investigation as to the advisability of continuing them in effect, though they did not conform to the long and short haul clause*, which rates so fixed should be the legal rates and would give the person paying them no ground of action based on the theory that they were excessive or in violation of the constitutional provision.

Here we must again consider that by the provisions of the amended Section 22, the Commission

was given power to establish rates of charges; that also by the same amended Section it was provided

“no provision of this constitution shall be construed as a limitation of the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind, or different, from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution.”

The amended Section 22 thus provides that the Eshleman Act shall be considered with reference to the amended Section 22 and any other constitutional provisions becoming operative concurrently therewith “and that said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the constitution, and of all other provisions adopted concurrently herewith.” *The intention of the constitution, therefore, seems clearly to be that the Eshleman Act is preserved in effect not only as a part of the amended Section, but also as though it had been passed by the Legislature after the adoption of the amended section.* It follows that the Legislature, if it had passed the Eshleman Act after the adoption of the amended section, had the right to confer additional powers upon the Commission *not limited by any provisions of the constitution.* It also follows that

the provisions of Section 15 of the Eshleman Act, giving the Commission power to establish rates, were at the time of the order of November 20, 1911, not limited by any provision of the constitution. Reading the Eshleman Act as an entirety it is apparent that the Legislature by it intended to confer upon the Railroad Commission the broadest and most untrammelled power with respect to the fixing of rates within the limitations placed upon such rate fixing power by the Federal Constitution.

This question first came up in the California Supreme Court in the case of *Pacific Telephone & Telegraph Company vs. Eshleman, et al.*, as Railroad Commissioners, a certiorari proceeding, reported in 166 Cal., beginning at page 640. The opinion is quite long but is the first exposition by the California Supreme Court of the powers of the Legislature, under the amended Section 22 of Article 12 of the California Constitution. It may be noted that while the main opinion was written by Justice Henshaw, concurred in by Justices Lorigan and Melvin, Justice Sloss wrote a concurring opinion in which he did not assent entirely to the reasoning by which the result announced in the main opinion was determined. Justice Shaw concurred with Justice Sloss, and Justice Angelotti dissented, but none of the learned justices dissented from the language used by Justice Henshaw on page 658 of the opinion, as follows:

“In view of these considerations we regard the conclusion as irresistible that the constitution

of this State has in unmistakable language created a Commission having control of the public utilities of the State, and has authorized the Legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the constitution to all other kinds of property and its owners. And while, under our republican form of government, a form of government under which the three departments—administrative, executive and judicial—have in the past one and all been controlled by the limitations of a written constitution. (*In re Duncan*, 139 U. S. 449, 35 L. Ed. 219, 11 Sup. Ct. Rep. 573), it is perhaps the first instance where a constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions, nevertheless this is but a reversion to the English form of government which makes an act of parliament the supreme law of the land. It was at one time argued as to such acts of parliament that while not otherwise invalid they would be decreed invalid if ‘contrary to natural justice or to natural right.’ But as this determination itself involved a resort to the courts and thus made the decision of the courts to that extent superior to the law of parliament, the present day juriconsults are agreed that an act of parliament is not controlled by natural right or natural justice, but is controlled solely by what is deemed to be

expedient and wise to the law-making power itself. (Bryce's American Commonwealth, Chap. 23.) So, here, the State of California has decreed that in all matters touching public utilities the voice of the Legislature shall be the supreme law of the land.

“Therefore, the following conclusions appear to be irresistible: That when the constitution itself, as here, declares that a legislative enactment touching a given subject shall not be controlled by any provisions of the written constitution, such a legislative enactment addressed to that subject *ex proprio vigore* carries with it all the force of an act of parliament.”

We, therefore, assert with confidence that as the amended Section 22 in terms said that the provisions of the Eshleman Act “shall have the same force and effect as if the same been passed after the adoption of this provision of the constitution and of all other provisions adopted concurrently herewith”, it inevitably follows from a consideration of the provisions of the Eshleman Act in the light of the decision of the highest court of the State, which we have just cited, and which under familiar rules of construction should in this case be conclusive upon this Court, that the Commission under the powers conferred upon it by the Eshleman Act did by its chain of orders offered by plaintiff in error, not only endeavor to relieve from whatever immediate operation might be claimed for the long and short haul clause, but also that it did

establish the rates being charged by the carriers on October 10, 1911, as the rates which should govern such carriers who choose to file applications until their applications could be finally determined and passed upon. It would be strange, indeed, if a Commission possessing the broad and constitutionally conferred powers of the California Railroad Commission did not have the power to relieve carriers from a construction of the long and short haul clause which made that clause, standing alone and without consideration of the other provisions of the constitution of which it is a part, and without consideration of the provisions of the Act expressly adopted and continued in force by that constitution, an arbitrary and automatically operating provision, which would at once make invalid that which theretofore was valid, and plunge into chaos the entire rate structure of the California carriers.

## VI.

*The motion for non-suit should have been granted as to the shipments moving after October 10, 1911, on the third ground (Record page 370) that it did not appear from the evidence taken in connection with the admissions made by the pleadings that the California Railroad Commission had never prescribed that defendant might in any case or in any of the cases referred to in plaintiff's causes of action be relieved from the prohibition of the California Constitution directed against charging less for the longer than for the shorter haul.*

Each of the counts in plaintiff's complaint relating to a shipment moving after October 10, 1911,

contains the following allegation, sample of which is in count No. 118 (Record page 326):

“That defendant has never been in any case authorized by the Railroad Commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said Railroad Commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the Constitution of California to charge less for the longer than for the shorter haul.”

In defendant's answer paragraphs IV and V (Record pages 336 and 337) contain the following denials:

#### IV.

“Defendant denies that it has never been in any case authorized by the Railroad Commission of the State of California to charge less for longer than for shorter distances for the transportation of property; and in that behalf alleges that in each case stated in said complaint where for the transportation of property it charged more for the shorter distance than for the longer distance, in the same direction, of the same amount (124) and class of property, it had been expressly so authorized to do by said Railroad Commission.

#### V.

“Defendant denies that said Railroad Commission of the State of California has never

prescribed that defendant might, in any case whatsoever, be relieved to any extent from the prohibition of the Constitution of the State of California to charge less for the longer than for the shorter haul, and in that behalf alleges that in the case of all of the shipments described in said complaint as having moved or having been delivered after October 10, 1911, the said Railroad Commission had prescribed, by an order duly given and made, that the defendant might be relieved from the prohibition of the Constitution of California against charging less for the longer than for the shorter haul."

It is evident that even on the theory of the case entertained by the defendant in error its counsel saw the necessity as to the shipments moving after October 10, 1911, of negating the idea that the Railroad Commission might have granted relief to the carrier and authorized the carrier to charge more for the shorter than for the longer distance.

Under familiar principles of pleading we submit that it was incumbent upon the plaintiff to make this showing of non-action by the Commission affirmatively as it was an essential part of its case in chief. It is no answer to this to say that the plaintiff in error when it opened its case endeavored to make this showing because it does not appear that the orders offered by the defendant in error were all of the orders made by the California Commission. It only offered certain orders, then believing and still believing them to constitute a showing of relief by the Commission. Its selection of

those orders did not, however, relieve the plaintiff below of the necessity of proving the allegation affirmatively made by it in its complaint and denied by the defendant. We submit, therefore, without extended citations of authorities, that even if the contention of the defendant in error respecting the proper construction of the amended Section 21 of the California Constitution be correct, it is essential for the plaintiff suing for the recovery of so-called excessive rates under that section to show not only that the rate charged and collected was a rate in excess of the lesser charge for the greater distance, but also that the Railroad Commission by virtue of the power conferred upon it by the amended Section had not relieved the carrier from the prohibition against charging the greater rate for the lesser distance. While this is not one of the most salient points in the case we submit that it is not only worthy of consideration but also warrants in any event a reversal of the judgment as to all of the causes of action involving shipments moving after October 10, 1911.

## VII.

*The complaint in this case is fatally defective because it does not allege that the plaintiff or any of its assignors had applied to and secured from the California Railroad Commission a reparation order based on the payment of excessive charges.*

*For that reason the Court erred in sustaining the demurrer to the sixth separate defense (Record p. 341), which pleaded that no such reparation order had been applied for or obtained.*

We take the ground that, at least since March 23, 1912,—after which date this suit was instituted—and perhaps before, a plaintiff who had paid a greater charge for a given distance than the carrier was charging for the same class of property for a greater distance over the same line or route, but who nevertheless had paid the rate fixed by the Railroad Commission of California for the actual movement, and who claims reparation on the ground of a violation of the Long and Short Haul clause either of the Constitution of 1879 or the amendment of 1911, must first apply to the Commission for and secure an order prescribing the amount of reparation to which he is entitled. We claim that the courts have no jurisdiction to entertain a cause of action based on a transaction such as we have described, unless it appears affirmatively by both pleading and proof that such reparation order has been obtained. We claim further that to hold otherwise would be destructive of the system of rate-fixing and enforcement adopted by the state, and would result in the very evils of rebating and discrimination which it is the chief object of the constitutional and statutory provisions to guard against.

The Eshleman Act, effective February 10, 1911, contained in Section 28 a provision for an application to and reparation on order by the Commission. The Constitution of 1879 was silent on that subject. Section 21 of the constitutional amendment of 1911, however, provides:

“Nothing herein contained shall be construed to prevent the Railroad Commission from order-

ing and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being *excessive* or discriminatory, provided no discrimination will result from such reparation."

thus clearly showing the intention of the framers of the amendment to confine to the initial jurisdiction of the Commission cases for the recovery of an excessive charge, for only by uniform rules and practice in a single centralized body could discrimination by refunds be avoided.

Section 71 of the California Public Utilities Act effective March 23, 1912, has already been quoted; it provides for application to and reparation order by the Commission for the refunding of *excessive* as well as discriminatory amounts. The word "excessive" is used with deliberation, for its meaning is different from that of the word "discrimination". In this respect the framers of the amendment of 1911 and of the Public Utilities Act did not follow the provisions of the Interstate Commerce Act, upon which are based the numerous decisions of the Commission and the courts defining the respective jurisdictions of commission and courts.

Sections 13, 14 and 15 of the Act to Regulate Commerce provide only for applications to the Commission by complaint "of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof", and for the award (Section 14)

of "damages"; and in Section 16 that if, after hearing, the Commission shall determine that the complainant is entitled to "an award of damages under the provisions of this act for the violation thereof", the Commission shall make an order directing the carrier to pay the sum, etc. The method of enforcement of this order is by suit in court.

The oft-construed provisions of the Interstate Commerce Act giving concurrent jurisdiction to courts, and the decisions referring to those provisions, may be differentiated from the provisions of the California Act. The provisions of Section 8 of the Interstate Commerce Act are that if a common carrier does anything by the act prohibited or declared to be unlawful, or omits to do anything by the act required to be done, "such common carrier shall be liable to the person or persons injured thereby, for the full amount of damages sustained in consequence of any such violation."

The provisions of Section 73-a of the California Act, giving a right of action "for actual damages", and in some cases for exemplary damages, for violation of the act, do not authorize suit to recover for an excessive or discriminatory charge. The exclusive primary jurisdiction is vested in the Commission by the reparation section. The significance of the word "excessive" as used in the California act with reference to the powers of the Commission in reparation matters, and its omission from the section authorizing court suits, is more ponderous when we come to consider that "excessive" is used

in the sense of the definition of that word given in the Century Dictionary—"exceeding the usual or proper limit, degree, measure or proportion; being in excess of what is requisite or proper"; whereas discrimination lies in subjecting one person or one community to disadvantage as compared with the rights or privileges given another under similar conditions and circumstances.

If it be true, as contended by counsel for claimants herein, that, irrespective of the fact that the intermediate rate charged is a rate lawfully on file with and established by the Commission, the person paying it has the right to recover on the long-and-short-haul clause theory, then we say with confidence that the framers of the Constitution and the statute could not have used a word with more precision than the word "excessive" in conferring primary jurisdiction upon the Commission to entertain such claims. If the right to recover exists at all, it is irrespective of the reasonableness of the rate, and irrespective of whether damages have been suffered by the collection of the rate.

In all of these Long and Short Haul claims it was freely conceded that no charge of unreasonableness per se is made as to the intermediate rate; nor has it been thought necessary in any of them to plead either unreasonableness or damage. Hence we say that it was the deliberate intention of the Constitution not to allow a court to construe tariffs, schedules and classifications, and first to say that there was in effect at the time of the movement to the

intermediate point a lesser rate to a more distant point, and then to say that the lawful rate to the intermediate point was not the rate established by the Commission, but was a rate which the Commission had not established for that point but had, for good and sufficient reasons, established to the more distant point; and finally to give judgment for the plaintiff for the difference, without giving the Commission the opportunity to obey whatever mandate is implied by the Long and Short Haul clause, by taking its option of either raising the through rate or lowering the intermediate rate.

Good considerations of public policy are abundant in support of our claim that the initial application must be made to the Railroad Commission. It is a constitutionally created body; it is the only body in the state having jurisdiction of rates; all of the record evidence necessary in any case under the Long and Short Haul clause is in the files of the Commission itself; it has rate experts and attaches who we must presume are capable of giving it expert and unbiased testimony when the question arises in a Long and Short Haul case as to what the through rate is. It knows also whether, since October 10, 1911, it has, to use the language of Section 22, authorized the carrier to charge less for the longer than for the shorter distance, or to prescribe the extent to which the carrier might be relieved from the general prohibition of the section; more important than all, it alone, if the right to reparation exists in the case of violation of the Long and Short Haul section, can so adjudicate the reparation claims as to pre-

vent the evil of rebating and discrimination which inevitably would arise if one court were permitted to hold our contentions in this case on the general questions of jurisdiction to be correct, and another court were allowed to uphold the plaintiff's position.

With the provisions of the Interstate Commerce Act before them, with the numerous decisions of the Interstate Commerce Commission and of the courts in mind, familiar with the constitutional and statutory history of California legislation on this subject, and with the knowledge of inequality of administration which had resulted in the early stages of rate legislation in other states by leaving courts vested with the power of passing initially on questions involving rates, the framers of the constitutional amendment of 1911 authorized the legislature to vest the power in the Commission to order reparation.

The Interstate Commerce Commission itself has recognized its reparatory powers under the old Long and Short Haul clause of the Act to Regulate Commerce, by granting reparation orders for the violation of that clause in the Lynchburg Cases, 6 ICC 632-46; Gardner vs. Southern R'y Co., 10 ICC 342-51; and other cases; though latterly, since the passage of the amended Fourth Section, the Commission has, by reason of the relieving clauses in the amendment, almost uniformly declined so to penalize carriers, while not disclaiming its power to grant reparation in some cases of that class. (26 ICC 628; 25 ICC 193; 24 ICC 604.)

The term "overcharge" is sometimes used loosely. In modern railroad law, since rate regulation by

means of publicly promulgated tariffs came to be required, "overcharge" has the technical legal meaning of a charge collected by a carrier in excess of the published tariff rate for the service performed. Actions for such overcharge have been sustained in state and federal courts, sometimes on the theory that the publication of the tariff amounted to a contract between the carrier and the shipper, at other times on the theory that the money had been paid or collected by mistake, again, by virtue of specific statutory or constitutional provisions giving a right of action for the overcharge, and sometimes without assigning any particular reason for giving the plaintiff judgment. Never, however, have the Federal Courts or the Interstate Commerce Commission, so far as we have been able to ascertain by quite diligent research, entertained an action or claim for overcharge where the rate collected was fixed by a federal or a state commission or established by the carrier through the medium of such commission, and duly filed and promulgated in accordance with the law and the regulations of the Commission. With confidence we challenge counsel for the claimants herein to cite the Court to such a case.

The Interstate Commerce Commission has held, in *Laning vs. Railway*, 17 ICC 37-39, that for a straight overcharge—that is, one in excess of the lawful tariff—it has jurisdiction concurrent with the courts, on the theory that as against the carrier its published tariff is conclusive of the fact that the higher rate is unreasonable. It must be borne in

mind that the initial jurisdiction of the Interstate Commerce Commission to award reparation is derived solely from the provisions of the Act to Regulate Commerce which we have referred to in this division of the brief, and is not broadened, as is that of the California Commission, to include rates merely "excessive".

We have seen that the act confers upon the Commission the power to make a reparation order for the repayment of an excessive charge. Let us see whether that jurisdiction, primary and irreviewable though it may be, is exclusive. It cannot be doubted, since the decision of the California Supreme Court in *Pacific Telephone & Telegraph Co. vs. Eshleman*, decided December 23, 1913, that the Railroad Commission created by the constitutional amendments of 1911, and whose powers were supplemented by the present California Public Utilities Act, possesses not only powers but jurisdiction which the framers of the Constitution of 1879 never intended to and did not confer upon the Railroad Commission created by that constitution.

Although there was some difference of opinion among the Justices as to other matters, the members of the Court are unanimous in holding that in so far as judicial powers have been conferred upon the Commission within the limits prescribed by the amended sections of the Constitution, those powers are in derogation of the powers theretofore possessed by the courts of the state. Therefore it will not do to say in this case that our claim that an application

to the Commission is a prerequisite to the maintenance of an action for the collection of the claims sued upon is in conflict with the provisions of the Constitution conferring jurisdiction upon courts. In effect, the people, by the adoption of these amendments, and the legislature by amplifying them as it is empowered and commanded to do, have created a new court which, within its jurisdiction and within its constitutional and statutory limitations, is as supreme and exclusive as the Supreme Court itself. That this is true there can be no question, so long as the decision in the Pacific Telephone case remains the law of the state.

Therefore, seeing that there is no constitutional objection to the vesting of this preliminary jurisdiction we claim for the Railroad Commission, let us see whether the conference of the jurisdiction is in its nature exclusive. We have already pointed out that to allow every trial court in the state to pass on Long and Short Haul cases without a preliminary application to the Commission is both inexpedient and subversive of the system of rate regulation and enforcement established by our Constitution. It is no answer to say that the claim we make in this respect is not borne out by the line of federal cases illustrated by *Texas etc. R'y vs. Abilene Cotton Co.*, 204 U. S. 426; *Robinson vs. Baltimore R'y*, 222 U. S. 506; *Illinois etc. R'y vs. Henderson*, 226 U. S. 441; *Morrisdale Coal Co. vs. Pennsylvania Railroad Co.*, 230 U. S. 304; *Pennsylvania Co. vs. International Coal Co.*, 230 U. S. 184; *Mitchell Coal & Coke Co. vs. Pennsylvania Railroad*, 230 U. S. 247, and the federal cases therein cited.

These cases are exactly in line with the claim which we are here making, namely, that where a question involving singleness of practice and uniformity of rate is to be settled, its settlement by the courts amounts to the indirect exercise of a rate-regulating power. In view of the broader scope of the California act than the reparation sections of the Interstate Commerce Act, these decisions have even greater significance in the present inquiry.

The Supreme Court of Indiana, in *St. Louis Southern R'y vs. Patterson*, decided March 12, 1914, reported in 104 NE 512, which involved the question of overcharges under an interstate tariff, after reviewing the federal decisions said:

“The action declared on in the seventh and eighth paragraphs here shows a contention relating to the lawful construction of an interstate tariff. Such construction would require the court to elucidate and declare the true meaning of the rate. *Terre Haute etc. Co. vs. Erdel*, 158 Ind. 344, 62 NE. 706. The authority to decide a matter involves the power to make an erroneous decision. It is manifest that the courts of Indiana might adopt appellee’s construction of the rate, while those of Missouri might adopt appellant’s. These different constructions would destroy the uniformity in rates sought by the enactment of the interstate act.”

It matters not in the case at bar that the published tariff rates to the intermediate and the more distant points were admitted by the defendant’s answer.

They might as easily have been denied, and it would then have become the duty of the Court to determine what the terminal rate was. This would have involved the inspection and construction of tariffs, classifications and schedules, for which the Commission is peculiarly fitted, and which the Legislature has deliberately committed to the Commission under constitutional authority.

If a Justice of the Peace in a township in Kern County might decide that the lawful tariff rate was  $37\frac{1}{2}$  cents per hundred pounds on a certain commodity from San Francisco to Los Angeles, and give judgment for the difference between that and the higher intermediate rate charged on the same commodity to Bakersfield, a Justice in the adjoining township, or in any other township between San Francisco and Los Angeles where such a higher intermediate rate existed, might, after a sage inspection of the tariff schedules and classifications—complicated publications, on the construction of which even expert traffic men often differ—decide that the through rate from San Francisco to Los Angeles on the same commodity was more or less than  $37\frac{1}{2}$  cents—a result which we can see at once would bring about confusion and discrimination.

Further, Commissions frequently order reparation to all persons of a given class, although only one of those persons may have applied to the Commission and brought the excessive or discriminatory charge to the attention of the Commission. It is hardly necessary to say that a court has no power to do this.

No railroad man of today desires to go back to the days of rebating and discrimination. There was nothing *malum in se* in those practices but economically were more hurtful to the railroads than they were to the people served by them. During that period railroad credit was at its lowest ebb, and receiverships were frequent. For the Court to hold that by reason of greater diligence on the part of a shipper or his attorney, community prejudice against one of the parties, greater ability of one attorney or the other, or neglect or disinclination to obtain review of judgments, one shipper may obtain the benefit of a rebate from published tariff rates by using the pretense of the Long and Short Haul clause, while his neighbor may be deprived of that benefit, even though he seeks to obtain it in a lawful way, is merely to encourage another form of discrimination. It is for the purpose of controlling that feature of rate regulation by a centralized body, presumably expert and impartial, that, as we claim, the plaintiff here had no standing in court until it first secured from the Commission an order to refund what it claims to be an "excessive" charge—a charge respecting which it does not allege that he was damaged, and as to which it does not claim unreasonableness.

Our view that the powers of a commission in such respects are exclusive, even though the act does not specify that they are exclusive, is borne out by a number of cases. The jurisdiction of such commissions under the statutes of other states has been held exclusive in nearly every instance, and the

reasoning of those cases is applicable, we submit, to the situation at bar. In nearly every instance the grant of power made to the commission was a grant which was not in terms "exclusive".

*State vs. Chicago St. Paul. etc. Railway Co.*, 19 Neb. 476—application for mandamus to compel defendant to stop trains and build suitable depot, etc. The act creating the Board of Railroad Commissioners gave them the "general supervision of all railroads", and provided that they should "inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein". Also that "whenever in their judgment \* \* \* change of its houses or stations \* \* \* is reasonable and expedient \* \* \*" they should "inform said railroad corporation of the improvements and changes which they adjudge to be proper". The statute also provides for a previous hearing on the question. On demurrer to complaint, the Court said (page 484):

"Here is a special tribunal created for the very purpose of exercising jurisdiction in such cases, and its powers must be exhausted before this court would be justified in interfering."

This statute did not say "exclusive" jurisdiction or supervision.

*People vs. B. H. R. Co.*, 172 N. Y. 90. Mandamus will not lie in the first instance upon the application of aggrieved persons for the purpose of compelling restoration of continued train service, for the board of directors has discretion in the matter, an abuse

of which must be remedied by the board of railroad commissioners. The New York act gave the Commission power, upon due notice and after hearing, to determine whether “\* \* \* any change in the rates of fare for transporting freight or passengers, or that any change in the mode of operating the road and conducting the business is reasonable and expedient in order to promote the security, convenience and accommodation of the public”, and provided for enforcement of its orders by mandamus. The Court pointed out that the board had the power of personally investigating the company’s books, and were supposedly skilled in passing on such questions. And held that relator had mistaken his remedy, “for it (his grievance) should have been presented to the railroad commissioners, who have been given by the legislature an authority which the Court does not possess of making a determination in relation to grievances which parties think they have by reason of the manner in which the directors have disposed of the questions.” This statute does not in terms confer “exclusive jurisdiction”.

*Grand Trunk Railway Co. vs. Perrault*, 36 Can. Supp. Ct. 671: Action to compel defendant to establish and maintain farm crossing for use of plaintiff in passing over defendant’s road which intersected plaintiff’s farm. Defendant contended and Court held that the exclusive jurisdiction was in the board of railway commissioners. That statute provided:

“The board may, upon the application of any landowner order the company to provide and construct a suitable farm crossing across the railway, whenever in any case the board deems it necessary for the proper enjoyment of his land on either side of the railway, and safe in the public interest; and may order and direct how, when and where, by whom and upon what terms and conditions, such farm crossings shall be constructed and maintained.”

The Court lays stress upon the fact that the act provided that the board's determination of any fact should be binding and conclusive on all courts, and if there existed concurrent jurisdiction a world of conflict and confusion would ensue.

*Grand Trunk R'y Co. vs. McKay*, 34 Can. Sup. Ct. 18: Held that railway committee had exclusive power to regulate speed of trains in cities, under the statute which provides that they *may* “regulate and limit the rate of speed at which trains and locomotives may be run in any city \* \* \*”

*Bangor vs. Railway Co.*, 97 Me. 163: The Maine laws provide that public crossings shall not be established “unless after notice and hearing the railroad commissioners adjudge that public convenience and necessity require it”. Also, that when any way is laid out across a railroad, the commissioners shall determine the manner and conditions of crossing such railroad. This was a petition to compel defendant to construct a railroad crossing. Plaintiff, having failed on other grounds, claimed a prescriptive crossing. Of this the Court says:

“And a review of all the legislation upon the subject of railroad crossings in this state from 1878 to the present time clearly shows a progressive tendency of legislative opinion in harmony with the judgment of this court as expressed *In re Railroad Commissioners*, 83 Maine 273, that public safety requires the intersection of railroad tracks and roads to be under the control of the railroad commissioners. It was further provided by chapter 282 of the Laws of 1889 that a way may be laid out across, over or under the railroad track, ‘except that before such way shall be constructed, the railroad commissioners shall determine whether the way shall be permitted to cross at grade or not, and the manner and condition of crossing’. Indeed, it has been the avowed policy of the state to place the entire subject matter under the jurisdiction and control of the railroad commissioners. To hold that a prescriptive right to cross a railroad track can be acquired by an adverse use during the existence of these statutes would be wholly incompatible with manifest spirit and purpose of this legislation, and contrary to the settled policy of the state.”

*New York, New Haven, etc. Railroad Co. vs. New Haven*, 70 Conn. 390: Suit to restrain defendant from constructing any highway crossing upon the roadbed of plaintiff. Defendant claimed that its charter giving the court of common council the sole and exclusive authority and control over all the streets and highways within the city, and au-

thority to lay out, etc., empowered the city to construct the crossing in question. The Court held that:

“The railroad commissioners, and not the municipal authorities, have sole original jurisdiction of questions relating to changes in highways at grade crossings, when the determination of such questions affects the safety of the public.  
\* \* \* The language of Section 31 of the city charter should not be interpreted literally. It must be construed with reference to these general laws; and the general laws concerning the control of highways at grade crossings, in so far as they conflict with the provisions of Section 31, must control.”

And held that the city's only remedy was by application to the railroad commissioners under 3499 of the General Statutes.

*Missouri K. & T. R. Co. vs. Richardson* (Oklahoma), 106 Pac. 1108: The Oklahoma constitution confers on the corporation commission in general terms the regulation of railroads, and the Court held the power to be broad enough to include the determination of the proper point for crossing of two railroads, and that to this extent it overrides Section 1022 of statutes providing for the adjustment of the point and the damages by commissioners.

*State ex rel N. P. R. Co. vs. Railroad Commission*, 140 Wis. 145: Held, that the statute creating a Railroad Commission and providing that every crossing of railroad tracks should be above, below

or at grade of the tracks, as the Commission should decide, gives the Commission power to determine the point of crossing, though the statute contains no express clause to that effect, and though Section 1828 of the General Statutes provided for appointment of commissioners by court to determine points and manner of crossings, or compensation in case of dispute.

*Smith vs. Town of New Haven*, 59 Conn. 203, 208: Under statute providing that "When a new highway, or a new portion of a highway, shall hereafter be constructed across a railroad, such highway or portion of highway shall pass over or under the railroad, as the railroad commissioners shall direct", it was held proper for the commissioners to pass on this question before the highway had been legally laid out—this over the objection that they had no jurisdiction to make an order in the matter prior to the laying out of the highway.

*Cullen vs. N. Y. R. Co.*, 66 Conn. 211: Action to recover damages occasioned by closing of a certain highway in the City of New Haven, upon order of the railroad commissioners. Held, by Judge Baldwin, that the provisions of the charter of New Haven, giving its common council sole and exclusive authority over all streets and highways within the city, must be construed with the provisions of the General Statutes relating to the location and operation of railroads and powers of railroad commissioners in reference thereto. And "A steam railroad is a road in the safe maintenance and operation of which the whole state is directly interested. It is

therefore put under the supervision of a board of state officers, with extensive powers. Their authority sometimes trenches upon what would otherwise be within the exclusive jurisdiction of some particular municipality, and wherever it does the latter must give way, for so only could any general policy of administration be carried out. The proper regulation of railroads, in their course through different towns, is a matter which is necessarily of more than local concern. \* \* \*

If any doubt whatever existed as to the right of the legislature to confer judicial powers upon the Railroad Commission, untrammelled by other provisions or limitations of the constitution except the one that such powers must be germane to the constitutional powers expressly conferred upon them, but of course subject to certain constitutional provisions designed to protect liberty and property, that doubt has been removed by the decision of our Supreme Court in *Pacific Telephone & Telegraph Co. vs. Eshleman*, 166 Cal. 640.

The question whether the Legislature had the right to confer legislative or judicial powers upon the Railroad Commission is entirely a state question. In *Consolidated Rendering Co. vs. Vermont*, 207 U. S. 541, the Supreme Court of the United States, at page 552, says that:

“There is no provision in the federal constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon non-judicial bodies certain functions that may be called judicial.”

On the same principle, there is nothing in the Federal Constitution which prohibits a state from conferring legislative powers upon administrative bodies. Accordingly, in *Southern Pacific Co. vs. Campbell*, 230 U. S. 537, Mr. Justice Hughes, in delivering the opinion of the Court, concludes as follows:

“The criticism made in the bill, that the Railroad Commission act violated the state constitution in conferring upon the Commission authority to exercise legislative, executive and judicial powers, has been answered by the decision of the state court sustaining the statute. *State vs. Corvallis & E. R. Co.*, 59 Or. 450, 117 Pac. 980.”

See also in this connection, *O. R. & N. Co. vs. Campbell*, 173 Fed. 957, 978, in which case, after an exhaustive review of the authorities, the Court holds that there can be no valid objection to conferring legislative authority upon the Oregon Railroad Commission, and that the conferring of such authority does not violate the provisions of Section 1 of Art. III of the Constitution of Oregon, dividing the functions of government into three separate departments, executive, legislative and judicial, and providing that no person charged with official duties under one of these departments should be competent to exercise any functions of another, except as provided in the Constitution itself.

These questions were presented to the District Court of Appeal for the Second Appellate District

of the State of California in the case of *Southern Pacific Company* vs. *Superior Court of Kern County*, a certiorari proceeding to review a judgment of the Superior Court in a case which arose in the Justice's Court in Kern County. The case has not yet been printed in the official California Reports, but may be found at page 397 of Volume 150 of the Pacific Reporter. The District Court of Appeal, after a long discussion of the statutory provisions, held that if a charge in violation of the long and short haul clause was in conflict with the Constitution it was a charge beyond the jurisdiction of the Railroad Commission, because it was a charge that the Commission could not legalize after it was made and paid, however just the amount might seem to be, "conceding that it could legalize any subsequent charges", and that the jurisdiction to pass upon an alleged illegal charge of this kind was necessarily vested in the courts.

The lengthy discussion by the Court is apparently *obiter*, because the Court concludes by saying that it is not concerned with any error, or absence of error, that may inhere in the judgment of the Superior Court, because that judgment was not subject to appeal, having been rendered on appeal to the Superior Court from the Justice's Court. The Court then held that the Superior Court had jurisdiction to hear and determine the case, and declined to annul its judgment on a proceeding in certiorari.

A petition for transfer to the Supreme Court was filed by the petitioner, and the opinion of the Supreme Court in that respect may be found at page

404 of 150 Pacific Reporter. On the point that application to the Railroad Commission was necessary, the Supreme Court said:

“It would seem to be immaterial in this proceeding whether or not it is essential to the cause of action in the courts that prior proceedings should have been had before the Railroad Commission. If such prior proceedings are essential, the failure of the plaintiff to show such action simply goes to the making of a sufficient cause of action, a matter not reviewable in certiorari.

“Our denial of the application for a hearing in this court is not to be taken as an approval of the views of the District Court of Appeal as to the necessity of such action in any case. We say this much, not with the purpose of expressing any disagreement with those views, because we have not deemed it advisable to consider the same on this application, and prefer to leave that matter to be decided in some case where it is directly involved, rather than to grant a hearing in this court of a case correctly decided by a District Court of Appeal, for the mere purpose of considering matters not properly cognizable in such a proceeding as this.”

It will thus be seen that the question of the necessity of application to the Railroad Commission has not been foreclosed by any authoritative decision of the California Appellate Courts, and that the

Supreme Court itself is, to say the least, in considerable doubt as to whether such application was necessary.

### VIII.

*The Judgment of the District Court should be reversed.*

We respectfully submit that the situation here presented is one which does not call for any strained or illiberal construction of the provisions of the California Constitution or the California statutes hereinbefore referred to.

In the case at bar the plaintiff in error, a railroad carrier, has during both of the periods above discussed, collected to the intermediate points in question the rates established and promulgated by the Railroad Commission, and rates which, under the penal provisions hereinbefore quoted, it was bound to observe or to suffer prosecution. As to the amounts collected before October 10, 1911, we offered to show that they were specifically fixed and established by the Commission, and as to the amounts collected after October 10, 1911, we offered to show that they were rates which the railroad was expressly authorized to charge by the series of orders offered in evidence and refused admission.

We think it familiar learning that a carrier is not called upon to assume the unconstitutionality of a law until such unconstitutionality has been definitely determined by a Court of competent jurisdiction. Plaintiff's whole case proceeds upon the theory

that, notwithstanding these rates had been fixed in the most formal manner by the Railroad Commission, the carrier should have obeyed the supposed mandate of the Constitution and charged the lesser rate, although by so doing it would have subjected itself to prosecution under the provisions of the acts above referred to, and we were blandly told by the defendant in error that in the event of such a prosecution we might have defended on the ground that the rates so established were illegal to the extent that they contravened the long and short haul provisions of the Constitution. The principle we here contend for is well expressed by the Supreme Court of Louisiana, in *Factors' & Traders' Insurance Co. vs. City of New Orleans*, 25 La. Ann. 454, 460 (33 Louisiana Reports, Annotated Edition, 314), in the opinion written by Justice Morgan on rehearing (33 La. 319):

“There is, in our opinion, another reason why the plaintiff should not recover, It is, that the law under which the tax was paid was in full force and vigor at the time the money was paid. It is contended that it never had any life because it was unconstitutional; that an unconstitutional law is no law, and therefore must be considered as never having been written. This is a fallacy. The rule of universal application is that all laws are presumed to be constitutional until the contrary is decided. Courts do not assume to themselves the prerogative of deciding on their own motion that a law under which rights are claimed or duties are imposed is

unconstitutional. To authorize them to do this the matter must be directly put at issue by the parties litigating before them. Rights can be acquired under a law which may be determined to have been unconstitutional, and pains and penalties be avoided by those who justify their acts as having been committed under a law, however that law may have been subsequently declared to have been unconstitutional.”

In *State vs. Carroll*, 38 Conn. 449, on page 473, the Court, after speaking of the principle of judicial construction, that before an Act of the Legislature be declared unconstitutional its repugnance to the provisions or implication of the Constitution should be manifest, says:

“It has never been claimed, to my knowledge, before that a citizen may adopt that judicial rule of construction and treat a law if manifestly unconstitutional as without the semblance or color of authority.”

We respectfully submit that the judgment should be reversed.

Respectfully submitted,

HENLEY C. BOOTH,  
FRANK B. AUSTIN,  
GEORGE D. SQUIRES,

*Attorneys for Plaintiff in Error.*

WM. F. HERRIN,

*Of Counsel.*